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IN THE

Supreme Court of the United States

October Term, 1982

WHEELING-PITTSBURGH STEEL CORPORATION, a corporation,

Petitioner,

vs.

SECRETARY OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I. The general duty clause of the Occupational Safety and Health Act broadly condemns "recognized hazards . . . likely to cause death or serious physical harm." The courts have uniformly compensated for this otherwise unconstitutional vagueness by applying the objective standard of a reasonable person familiar with conditions in the industry.

1. Did the Court of Appeals, in approving the complete failure of the Review Commission to apply the required objective standard of conduct to this case deprive petitioner of the protection afforded it by the due process clause of the constitution?

2. Did the Court thereby render a decision in conflict with the decisions of other federal courts of appeals?

3. Did the Court thereby so far depart or sanction such a departure by the Commission from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

II. 1. Did the Court of Appeals, in approving the Commission's failure to explain its departure from the administrative law judge's factual findings herein render a decision in conflict with the decisions of other federal courts of appeals?

2. Did the Court thereby so far depart or sanction such a departure by the Commission from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

List of all Parties

Wheeling-Pittsburgh Steel Corporation[1]

Secretary of Labor,
United States Department of Labor

Occupational Safety and Health
Review Commission

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[1] Petitioner, Wheeling-Pittsburgh, in compliance with Rules of the Supreme Court of the United States, Rule 28.1, states that it has no parent or affiliate corporation, and lists the following as subsidiaries:

Consumers Mining Company
W-P Coal Company
Fort Duquesne Coal Company
Gateway Coal Company
Harmar Coal Company
Mingo Oxygen Company
Monessen Southwestern Railway Company
Pittsburgh-Canfield Corporation
Three Rivers Coal Company
Wheeling-Gateway Coal Company
Wheeling-Itasca Company
Wheeling-Pittsburgh Trading Company
Wheeling-Minmetals International, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Reports of Opinions Below

The Court of Appeals for the Third Circuit issued no reported opinion in this matter, but instead entered a judgment order (1a).[2]

The Administrative Law Judge and the Occupational Safety & Health Review Commission each issued opinions, as follows, both of which are unreported:

> Decision and Order of Judge Henry K. Osterman, OSHRC OSHRC Docket Nos. 76-4807 and 76-4808 (consolidated) Dated August 9, 1977 (3a).
>
> Commission Decision, Dated November 24, 1981 OSHRC Docket Nos. 76-4807 and 76-4808 (consolidated) (10a).

[2] Citations are to Appendix filed separately herewith.

Grounds on Which Jurisdiction in this Court is Invoked

A Judgment Order of the United States Court of Appeals for the Third Circuit was entered on July 28, 1982.

The Order denying Wheeling-Pittsburgh's Petition for Rehearing was entered on August 24, 1982.

Jursidiction in this Court is predicated upon 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Regulations

The constitutional provisions, statutes and regulations involved herein are the due process clause of the Fifth Amendment to the United States Constitution, U.S. CONST. Amend. V; the Occupational Safety and Health Act of 1970, 29 U.S.C. §§654, 660 (1970); and 29 C.F.R. §2200.73. Pertinent portions of these provisions are set forth at Appendix F hereto.

Statement of the Case

Procedural Posture

This case was filed in the Court of Appeals for the Third Circuit as a petition for review of an order by the Occupational Safety & Health Review Commission, whereby petitioner, Wheeling-Pittsburgh Steel Corporation, was found to have violated 29 U.S.C. §654(a), the "general duty clause" of the Occupational Safety and Health Act of 1970 (OSHA). Federal jurisdiction in the Third Circuit Court of Appeals was based upon 29 U.S.C. §660 (a), in that the petitioner, whose principal office is located at Pittsburgh, Pennsylvania, within the Third Circuit, sought review of a final order of the Commission.

The Commission order in question overturned a decision and order entered more than four and a half years previously by Administrative Law Judge, Henry K. Osterman, which had vacated the citations. The Commission decision held that the ALJ had applied an incorrect definition of "recognized hazard." (19a-22a). Having reached that conclusion, the Commission cursorily reviewed the other elements of a general duty violation and reversed the ALJ. The Commission gave no explanation of its rejection of the ALJ's factual findings. Nor, in reaching its conclusion, did the Commission apply at all the objective standard required to define and narrow the scope of the general duty clause.

The employer filed its petition for review with the Third Circuit, which denied its petition by judgment order and without oral argument. In lending rubberstamp approval to the Commission's failure to apply any objective standard to petitioner's conduct, the circuit court deprived the petitioner of the protection afforded by the due process clause of the Constitution. In this regard, the circuit court ruling also conflicts with the decisions of other circuits and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The circuit court's ruling also fails to require the commission to provide a reason for its departure from the ALJ's factual conclusions. This failure also conflicts with decisions of other circuits and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Because the challenged practice has proven safe and has never resulted in an injury to an employee, and would be extremely expensive to alter, the issue is of

vital importance to this employer is a depressed industry. Because of the disposition of this matter totally without reference to any objective standard, the question or required notice in general duty clause cases in the Third Circuit is also left in doubt, to the detriment of all employers subject to OSHA, as well as the petitioner.

Facts

The employer is a manufacturer of basic steel products. It operates two steel-making facilities that are the subject of the citations presented for review herein. These facilities are the South Works, at Mingo Junction, Ohio, and the North Works, at Steubenville, Ohio (some four miles distant). At these facilities, the employer owns, maintains and operates an inter-plant railroad system (73a-74a).

During the period between October 4 and October 8, 1976, the subject facilities were inspected by a compliance safety and health officer. Following the inspection, two substantially identical citations were issued as set forth below:

> Public Law 91-596 Section 5(a)(1): The employer did not furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
>
> a) Brakes on bottles that transport molten metal were not set when they are spotted.
>
> b) Brakes on bottles that transport molten metal were not maintained to assure correct functioning. . . .

(97a).

The "bottles referred to in the citations are also known as hot metal transfer cars, and both terms are used interchangeably. These cars are used to transport hot, molten iron from the blast furnaces to the basic oxygen furnace (BOF), where it is mixed with other raw materials and converted into steel (73a-75a).

A bottle is approximately 33 feet long. It is shaped like a torpedo, about 11 feet high in the center and tapering down at either end. The car contains an opening in the top, through which the molten iron is loaded and unloaded. An individual car weighs roughly 125 tons empty and up to about 325 tons loaded (15a).

The bottles are moved back and forth between the blast furnaces and BOF by means of a diesel-powered locomotive. A train crew, normally consisting of an engineer, brakeman and conductor, is assigned to the task of transporting the cars (74a-75a).

"Spotting," referred to in the citations, occurs when the cars are placed beneath a spout leading down from the blast furnace to receive molten metal. The employer's long-standing practice has been to fix cars in position for spotting by blocking the wheels with tapered wooden blocks known as "chocks" (87a). This job is performed by the two groundmen on the train crew, the brakeman and the conductor (78a). After the car is secured in place, the locomotive uncouples and pulls away, returning when the car has been filled, to hook up again and pull it away.

The dispute in this case centers around the use of chocks instead of mechanical brakes. The employer has chosen to rely on chocking instead of mechanical braking because chocking is considered to be the safest and most feasible method of stabilizing the cars (81a, *et seq.*).

Chocking is the method of choice in other steel companies, as well (84a-85a). It is undisputed that there have been no resulting accidents or injuries in the many years the employer has followed this procedure at the two plants (75a-76a, 83a).

The mechanical brakes in question are not air brakes. They are hand brakes, set by turning a wheel at either end of the car (81a-83a).

On a conventional railroad car, these are trucks (each consisting of two parts of wheels) under each end of the car. The brake on one truck is connected by mechanical leverage to the brake on the other truck. A bottle car, on the other hand, has double trucks under each end or a total of sixteen wheels. There is no physical connection whatsoever between the brake on one set of trucks to those located at the opposite end of the car. On cars of this massive weight, the hand-braking system is of limited utility, at best (81a-83a). There is record testimony that a single brake would be inadequate to hold the car (82a-83a).

The chocking consists of placing a soft wooden block behind one wheel of the car at rest. If the car moves, it rides slightly up onto the wedge and crushes into it, anchoring the chock securely between the wheel and the rail. This creates an incline that the car would have to surmount in order to move off spot (81a-82a).

The bottles are used exclusively at the two subject plants, an essentially level location next to a river (85a-86a). Under these conditions, the employer considers chocking to be both more effective and safer than hand-braking. Other steel companies in the industry also rely on chocking rather than hand-braking (84a-85a).

Considerable testimony was introduced at the hearing to show the hazards associated with hand-braking as opposed to chocking. The most significant hazard relative to the present discussion was that of close clearance.

In the iron alleys, where the cars are loaded, there is very narrow clearance. At Mingo, only one brake, the outside brake, would be accessible to the brakeman. Therefore, the car would be braked only at one end. At Steubenville, *neither* brake would be accessible because of close clearance on both sides. If an employee had to set or release the less accessible brake, he would have to reach into a hazardous position to do so because of the narrow clearance. Moreover, the employee would not be visible to the engineer operating the locomotive, as he would be if chocking (87a-89a).

This problem was essentially conceded by the Secretary's witnesses, including the compliance officer. The Commission, in fact, affirmed so much of the administrative law judge's decision as vacated the citation in close-clearance situations (24a). In other words, brakes need not be set *at all* while spotting at the North Works (Steubenville) and only the outside brake at the South Works (Mingo). Record testimony indicates that a single brake is not adequate to hold a car (82a-83a).

In the employer's long history of using chocks instead of brakes, there have been no resultant accidents or injuries. Yet the employer is told to bear the expense of providing and maintaining handbrakes for use in the extremely limited circumstances described above, and in a situation of limited utility, at best.

ARGUMENT

I. The Court of Appeals Improperly Approved the Commission's Total Failure to Apply the Required Objective Standard of Conduct Under the General Duty Clause.

The general duty clause of the Occupational Safety and Health Act requires each employer to furnish his employees with "employment and a place of employment . . .free of recognized hazards . . . likely to cause death or serious physical harm." 29 U.S.C. §654(a)(1). Unlike the myriad very specific regulations promulgated under the Act, the general duty clause offers the employer no advance notice of what conduct will be held to constitute a violation.

Because the OSHA general duty clause is broad and undefined, reference to an objective standard is essential in its application. Unless such a standard is applied, the general duty clause does not comport with constitutional requirements of fair notice. *Magma Copper Co. v. Marshall*, 608 F.2d 373, 376-77 (9th Cir. 1979).

In 1980, the Third Circuit adopted the prevailing objective standard in *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1078 (3d Cir. 1980). The *Voegele* court quoted approvingly therein from the standard applied in *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978), as follows: "Whether a reasonable [person] familiar with [the] conditions in the . . . industry would have instituted . . . more elaborate . . . precautions?"

In the instant case, the employer has utilized the chocking procedure for many years, with a perfect record of safety. Other employers in the industry have chosen to chock rather than to use hand brakes. No specific OSHA regulation prohibits chocking or requires hand

brakes. And yet the employer is held to have violated the law in failing to utilize hand brakes.

This matter initially was heard by Administrative Law Judge Henry K. Osterman. The judge held that the Secretary had established no violation, and accordingly vacated the citations.

Wholly without reference to the required objective standard, the Review Commission reversed. On petition for review, the Third Circuit Court of Appeals declined to hear oral argument and summarily approved the Commission decision by Judgment Order, stating that "the Commission's findings of fact are supported by substantial evidence and it applied the correct legal standards" (2a).

The application of the general duty clause in this case without reference to an objective standard impermissibly extends the scope of that extremely broad and vague statutory provision. The Court thereby deprives petitioner of the protection of the due process clause of the Constitution. In so doing, the court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the Commission, as to call for an exercise of this Court's supervisory powers. The Court of Appeals decision also directly conflicts with its own establishment of an objective standard in *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1078 (3d Cir. 1980), as well as with the decisions of other courts, including *Magma Copper Co. v. Marshall*, 608 F.2d 373, 367-77 (9th Cir. 1979); *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978).

The elements of a general duty clause violation are well-established.

1) existence of a recognized hazard;

2) likely to cause death or serious injury;

3) failure to render the workplace free of the hazard;

4) existence of a feasible means of abatement.

Champion Petroleum Co. v. OSHRC, 593 F.2d 637, 640 (5th Cir. 1979).

The Secretary has the burden of proof as to each of the above elements. 29 C.F.R. §2200.73. "Since the general duty clause is so broad, the evidence to support a charge of violation should be specific and detailed." *Brennan v. OSHRC*, 502 F.2d 946, 952-53 (3d Cir. 1974).

In determining elements 3 and 4 above, *i.e.*, whether the employer has failed to render the workplace free of the hazard, and whether a feasible means of abatement exists, the prevailing objective standard of conduct requires the Commission and the Courts to focus on the employer's practices. The question, as to these two critical elements, must be whether the reasonable person, familiar with conditions in the industry, would have instituted more elaborate precautions. *Voegele, supra*, 625 F.2d at 1078.

This was not done in the instant case. Because of the Commission's disagreement with the parties and administrative law judge regarding definition of the first element, "recognized hazard," this element received virtually all of the Commission's attention. The Commission not only failed to apply the objective standard to elements 3 and 4, it did not even allude to it.

The Commission's entire discussion of whether more elaborate precautions should have been instituted consists of conclusory statements that: (a) petitioner's use of chocks does not free the workplace of the hazard and (b) the Secretary "has met his burden of establishing the feasibility and likely utility of setting brakes in most situations." (23a-24a).

A Second Circuit case, *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38 (2d Cir. 1978), is instructive with regard to correct application of the objective standard. In that case, American simply required its cargo handlers to wear "sturdy work shoes," and instructed its workers in the safe handling of cargo. *Id.* at 40.

American argued that, without application of an objective standard, the regulation was unconstitutionally vague. "It also claimed that the safety measures then in effect were all that a reasonably prudent man, conversant with the circumstances of the industry, would require." *Id.*

The Second Circuit held as follows:

> Although it is well-established that our powers to review the substantive determinations of agencies are limited, . . . it is within the scope of our oversight responsibilities to ascertain whether the Commission applied the correct legal standard . . . . We conclude that it did not."

Id. at 41.

In the *American Airlines* case as in the instant case, the Commission had concentrated on the "recognized hazard" element to the exclusion of the other essential elements of a general duty violation. The court found er-

ror in the Commission's narrow focus on "merely whether 'a reasonable person would be appraised [sic] of a hazard to feet' in the American facility." *Id.* Rather, the proper concern is "whether a reasonable man familiar with conditions in the airline industry would have instituted protective measures more elaborate than the precautions taken by American . . . ." *Id.*

"[S]ince an administrative agency 'has the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct.' " *NLRB v. Majestic Weaving Co., Inc.* 355 F.2d 854, 860 (2d Cir. 1966).

As in the *American Airlines* case, the Commission here focussed narrowly on the existence of a hazard. It did not address what "the reasonable man familiar with conditions in the . . . industry" would have done. In these circumstances, the general duty clause becomes a purely subjective tool. It means only whatever the Secretary thinks it means, requiring employers to guess without guidance.

Failure to apply the required objective standard in this case has placed the employer in an impossible compliance situation. The decision also creates a quagmire for other employers in the industry who rely on chocking instead of hand-braking.

The subject citations charge only two violations: 1) failure to set brakes when the bottles are "spotted," and 2) failure to maintain brakes on the bottles (97a, 99a). "Spotting," as described above, occurs in the iron alleys when the cars are placed beneath spouts leading from the blast furnaces, in order to receive molten metal (15a).

At the evidentiary hearing before the administrative law judge herein, the employer presented evidence that in the areas where the cars are spotted, clearance is extremely narrow. This creates a hazardous situation for an employee attempting to set a brake because at Mingo only one brake is accessible, and at Steubenville *neither* is accessible. This problem was admitted by the Secretary's witnesses. The Commission, in fact, affirmed that portion of the law judge's decision which vacated the citation in close clearance situations (24a).

Under the circumstances, the employer is put to the expense of maintaining brakes for extremely limited use, in largely undefined circumstances. The citations themselves relate only to "spotting" in the iron alleys. Under the Commission order, neither brake need be set during spotting at the Steubenville iron alley and only one brake at Mingo.

The Compliance Officer stated that "it would depend on various conditions in the area whether it would be more safe or unsafe to use the brake . . . . [I]t is strictly a judgment factor." (76a-77a). Nevertheless, the Commission order decrees that brakes be set in "those situations in which one or both brakes can safely be set." The citations are vacated "for those situations in which it is too hazardous to set any brake." (24a).

The employer thus is told to bear the expense of maintaining the brakes, but not told when they must be applied. The resultant quandary for the employer is a direct result of the failure of the Commission and Court of Appeals to place this factual setting in an objective framework of "the reasonable man" in the relevant industry.

In the very recent case of *Secretary of Labor v. Inland Steel Company*, OSHRC Docket No. 79-3286, Administrative Law Judge Richard DeBenedetto considered the issue of hand brakes versus chocks. In an opinion, dated April 7, 1982, Judge DeBenedetto reached the same conclusion as did Judge Osterman in the instant case, *i.e.*, hand brakes are not required by the general duty clause. (Opinion set forth at Appendix D, 29a).

Unlike the Review Commission in the instant case, Judge DeBenedetto correctly applied the requisite objective standard " 'of a reasonably conscientious safety expert familiar with the pertinent industry.' " Opinion of Judge DeBenedetto (hereinafter "Opinion," at 57a), quoting from *Magma Copper Co. v. Marshall*, 608 F.2d 373, 377 (9th Cir. 1979).

Judge DeBenedetto reviewed much case law involving hand brake usage over the years, noting that "[o]ne of the primary objects of the Safety Appliance Act was the protection of railroad employees from the dangers incurred in manipulating handbrakes." (Opinion, at 59a). "Contrarywise, the Secretary has failed to show by any competent evidence that the use of blocks has been the cause of injury to Inland employees." (Opinion, at 61a-62a). Similarly, of course, there is a lengthy injury-free history in the instant case.

As in the instant case, Judge DeBenedetto noted that "[t]he Secretary failed to address the question of handbrake maintenance, a vital aspect of the case." (Opinion, at 64a). Judge DeBenedetto noted that "[t]his added to the existing car-maintenance problems may very well be an insurmountable task, which Inland obviously took into account when it chose to use the tapered wooden block as a substitute for hand brakes . . . ." *Id.*

Therefore, "[t]here is still another reason why the Secretary's case must fail and that is the failure to prove economic feasibility." *Id.* at 64a.

Had the Commission or the reviewing court applied the requisite objective standard to the instant case, as did Judge DeBenedetto, the employer herein would not be left to bear the great expense of maintaining brakes for extremely limited use in undetermined circumstances. Nor would the employer be left to guess at its peril as to the scope of its responsibility under the general duty clause.

II. The Court of Appeals Sanctioned the Commission's Failure to Explain Its Summary Rejection of the Administrative Law Judge's Findings.

Responsibility for determining whether the Secretary's burden of proof has been met rests initially with the Administrative Law Judge, who here found that the Secretary had failed to prove his case, particularly with regard to safety practices in other steel companies. The Commission's decision, reversing the judge, failed to explain its summary rejection of the judge's findings.

The Third Circuit Court of Appeals affirmed the Commission decision herein by judgment order. In so doing, the appellate court rendered a decision in conflict with the decision in *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974), which requires the Commission to explain any departure from the ALJ's factual findings. The Commission decision and affirming Third Circuit judgment order in this regard also so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Commission's decision is subject to judicial review and may be set aside if unsupported by "substantial evidence." 29 U.S.C. §660(a). In making its determination on the question of substantiality, the reviewing court "must examine the record as a whole, including the decision of the Administrative Law Judge." *Marshall v. C.F. & I. Steel Corp.*, 576 F.2d 809 (10th Cir. 1978). This duty is specifically embodied in the language of the statute. 29 U.S.C. §660(a).

This Court, in addressing the weight to be accorded to the Administrative Law Judge's findings in an NLRB case, stated:

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951). The same standard of review applies to Occupational Safety and Health (OSHA) cases, as well. See, *e.g.*, Brennan, *supra*, 502 F.2d at 950.

The Ninth Circuit has stated:

> "[T]he Board's supporting evidence, in cases where it rejects the examiner's findings, must be stronger than would be required in cases where the findings are accepted, since in the former cases the supporting evidence must be deemed substantial when measured against the examiner's contrary findings as well as the opposing evidence." [citation omitted].

Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977). "[T]he probative weight which may be properly given to testimony is severely reduced" where the administrative law judge has accepted opposing evidence. *Id.* at 1077.

A recent Third Circuit opinion explains the rationale behind according deference to the law judge's findings, quoting this Court:

> Weight is given the ALJ's determinations of credibility because he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records."

ABC Trans-National Transport, Inc. v. NLRB, 642 F.2d 675 (3d Cir. 1981), quoting from *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

It has been stated that the Commission will generally consider the ALJ's credibility determinations to be controlling. *P & Z Co.*, OSHRC Docket No. 76-431, 1977-78 CCH OSHD, ¶22413, 6 BNA OSHC 1189. It has also been noted that although the hearing officer's finding attains its maximum weight on matters of credibility, it is also valuable on other matters where "observation of the witnesses is likely to give a more accurate feel than reading a cold record ...." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966).

There are obvious inherent difficulties when the Commission overturns an ALJ's factual findings. Therefore, where the law judge's disposition of the case is rejected, the Commission is bound to explain why. *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974).

It would be difficult to imagine a "colder" record than that before the Commission in this case. The citations

were issued on October 29, 1976, charging W-P with failure to use or maintain brakes on its bottle cars. Testimony was taken before the Administrative Law Judge on March 16, 1977. Judge Osterman ruled on August 9, 1977, vacating the citations. He held that although there was "contradictory evidence" in the record, the Secretary had failed to carry his by a preponderance of the evidence (7a-8a).

More than four years later, the Commission ruled, reversing Judge Osterman's decision, with one limited exception. Despite the conflicting evidence in the record, the Commission chose to reject the trial judge's factual findings and substitute its own. The Commission did not offer any reasoned explanation for this departure, as it was required to do. The Third Circuit summarily affirmed, thereby sanctioning the Commission's failure to explain its rejection of the law judge's fresher factual conclusions.

Specifically, the law judge's most critical factual finding was rejected by the Commission without any explanation or discussion whatsoever. Not surprisingly, this rejected finding is directly relevant in applying the objective standard of the reasonable man familiar with conditions in the industry, which the Commission also ignored.

The trial judge's critical finding held the Secretary's evidence of usual practice in the steel industry to be inadequate, noting "the Secretary's failure to produce convincing evidence of the practice employed in other steel mills." (7a). This finding was ignored by the Commission opinion, which merely noted by way of footnote, "Other steel employers use hand brakes." (23a) this Third Circuit affirmed the Commission by judgment order.

The Commission is not required to accept an administrative law judge's findings of fact. It *is* required, however, to state its reason for rejecting the judge's findings. *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974).

The Commission's failure to state its reasons for rejecting Judge Osterman's most critical factual conclusion is obvious legal error. To have done so more than four years after the judge's decision, on the basis of a cold record containing substantial evidence to support the judge's view, is impermissible. In so doing, the Commission and the court of appeals, which sanctioned the error, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The decision also conflicts with that of the Ninth Circuit in *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974). For these reasons, the case merits this Court's review.

Conclusion

For the foregoing reasons, and in light of the critical importance of this general duty clause case not only to the instant litigants, but also to all other employers subject to the Occupational Safety and Health Act, petitioner Wheeling-Pittsburgh Steel Corporation requests this Court to grant a writ of certiorari to review the decision of the Third Circuit Court of Appeals herein.

Respectfully submitted,

DAVID J. ARMSTRONG
Counsel for Petitioner,
Wheeling-Pittsburgh Steel
Corporation

Dated:

Office - Supreme Court, U.S.
FILED
NOV 19 1982
ALEXANDER L. STEVAS,
CLERK

82-843

IN THE

Supreme Court of the United States

October Term, 1982

WHEELING-PITTSBURGH STEEL CORPORATION, a corporation,

Petitioner,

vs.

SECRETARY OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3015

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner,

vs.

SECRETARY OF LABOR,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

(D.C. Civil Nos. 76-4807 and 76-4808)

Submitted Under Third Circuit Rule 12(6)
JULY 27, 1982

Before: GIBBONS and HUNTER, *Circuit Judges.*
and LORD,* *District Judge.*

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* Hon. Joseph S. Lord, III, Chief Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix A—Judgment Order.

David J. Armstrong, Esquire; Susan K. Wright, Esquire; Dickie, McCamey & Chilcote, P.C., 3180 U. S. Steel Building, Pittsburgh, Pennsylvania 15219, *Attorneys for Petitioner.*

T. Timothy Ryan, Jr., Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; Dennis K. Kade, Counsel for Appellate Litigation; Judith N. Macaluso, Attorney, U. S. Department of Labor, Room S4004, Washington, D.C. 20210, *Attorneys for the Secretary of Labor.*

Wheeling-Pittsburgh Steel Corporation petitions to review a decision of the Occupational Safety and Health Review Commission holding that it committed a serious violation of the general duty clause of the Occupational Safety and Health Act by failing to maintain and use brakes on company railroad cars used to transport molten iron. The Commission's findings of fact are supported by substantial evidence and it applied the correct legal standards.

It is ORDERED, ADJUDGED and DECREED that the petition for review be and is hereby denied. Costs are taxed in favor of respondent.

BY THE COURT,

JOHN J. GIBBONS
Circuit Judge

Attest:

SALLY MRVOS
Clerk

Dated: JUL 28 1982

APPENDIX B

Opinion of Administrative Law Judge

UNITED STATES OF AMERICA

Occupational Safety and Health Review Commission

SECRETARY OF LABOR,

Complainant,

v.

WHEELING-PITTSBURGH STEEL CORPORATION,

Respondent.

OSHRC Docket Nos.
76-4807 and 76-4808
(CONSOLIDATED)

DECISION AND ORDER

APPEARANCES:

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Cleveland, Ohio 44199

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OSTERMAN, *Judge*, OSHRC

This is a proceeding initiated by Respondent pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 [hereafter the Act] to contest citations

issued to Respondent by the Secretary on or about November 29, 1976.

The record discloses that on or about October 29, 1976, Respondent was served with two separate citations each of which alleged a serious violation of Section 5(a)(1) of the Act in that the hand brakes on Respondent's "bottles"[1] used to transport molten metal were not maintained in effective working condition. Two citations were issued because the identical defects were observed at two separate but nearby locations (Tr. 9-10).[2]

Evidence given at the hearing establishes that certain of Respondent's "bottles" which shuttled back and forth between the two locations carrying molten metal were equipped with hand brakes, some of which did not function (Tr. 9-10, 12-24, 37; Exh. C-1 through C-31); that Respondent had received complaints about their defective condition from their employees and that Respondent had failed to properly correct the defective brakes on these cars (Tr. 62-64, 94-95). The "bottles" when empty weigh approximately 50 tons, when filled with molten metal they may weigh as much as 100 tons (Tr. 11-12). It is conceded by the Respondent that in general wooden chocks, or blocks, placed under the wheels were used to prevent movement of the loaded "bottles" instead of the hand brakes (Tr. 104-105; Compl. Br. p. 3). It was also shown that wooden chocks placed under the wheels of "bottles" are easily crushed by the immense weight of these cars (Tr. 58-59, 64-65, 79, 87-88, 93-94, 96-97). Oc-

[1] A "bottle" is a car used to transfer molten metal.

[2] Hot metal was transferred in "bottles" from Respondent's Steubenville North Plant to Respondent's Mingo Junction location, a distance of four or five miles.

casionally, a car parked on an incline would roll free and it would be necessary to chase the car and recapture it (Tr. 59-60, 87-88, 93-94, 96-97). The Secretary's evidence indicates that in order to place chocks under the wheels of these cars an employee must lean over and, at times, expose a part of his hand or body to injury if the car should move (Tr. 46-47; Exh. C-15 and C-17).

The Respondent has produced evidence that it is hazardous to rely upon hand brakes because of the close quarters in certain areas in which an employee must insert his body in order to reach the hand brakes and that because of the construction of these "bottles," a hand brake is inadequate (Tr. 106-110, 127, 130). Respondent has testified that the use of chocks is preferred in the steel industry and is the most effective way to brake these cars (Tr. 112). Respondent admits that its policy is to use wooden chocks to hold its "bottles" in place when they are being filled or emptied (Tr. 104-105). Respondent also produced evidence to show that the areas in which chocks are used are essentially level and that chocks are the least hazardous way to prevent movement of these cars (Tr. 115-121, 129-130).

Although the "bottles" are provided with brakes by the manufacturer, the evidence indicates that they are provided on these cars only because they are delivered via interstate railroad lines and that Federal statutes require brakes on cars which are moved in this manner (Tr. 105, 113).

The Secretary argues that the failure of Respondent to provide adequate brakes on "bottles" violates the Respondent's own safety rules as set out in Exhibit C-38

(Tr. 114). That rule, however, refers to the use of hand brakes on a grade or at the top of a grade. As indicated above, there is substantial evidence that the areas where these "bottles" are chocked is essentially level, *i.e.*, at the spouts.

Section 5(a)(1) of the Act provides that each employer

> shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

This Commission has held that a "recognized hazard" is one which is recognized in the industry of which the Respondent is a part, or by the general public, *Secretary of Labor* v. *Southern Soya Corp.*, Docket No. 515, 1973-1974 OSHD, 16,957. See also: *Secretary of Labor* v. *American Smelting & Refining Co.*, 501 F.2d 504 (8th Cir. 1974) and *Secretary of Labor* v. *Vy Lactos Laboratories, Inc.*, 494 F.2d 460 (8th Cir. 1974). The burden is upon the Secretary to establish this fact by a preponderance of the evidence.

The record herein includes testimony by the compliance officer that in the past when he worked as a supervisor at United States Steel, he observed that hand brakes were used on "billet" cars when they were parked.[3] He had never observed how "bottles" were braked nor had he conducted other inspections involving "bottles" (Tr. 28, 39-40).

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[3] A billet car is a different kind of car from the "bottles" with which we are concerned in this case.

A second compliance officer testified that he had been employed at the Empire-Detroit Steel Company for a number of years; that he had observed the method employed to hold "bottles" in place and that it was the practice at Empire to use both hand brakes and chocks (Tr. 69-71). On cross-examination this witness testified that his job at Empire was as "first helper" on a furnace; that he had never worked on the railroad crew; that it was not his job to manipulate any of the handling equipment; and that in order to spot a "bottle" under a spout at Empire it was necessary to push or pull the bottle up an incline or grade (Tr. 72-73). This witness had never observed the area of the blast furnace at either the Respondent's Mingo Junction Plant or the North Plant (Tr. 74).

In view of the Respondent's evidence regarding the general practice followed in steel mills (Tr. 112), and the Secretary's failure to produce convincing evidence of the practice employed in other steel mills, I conclude that the Secretary has failed to establish that the hazard which allegedly arises from the use of chocks to spot "bottles" in lieu of hand brakes, is one which is recognized in the industry of which Respondent is a part, or is a hazard which is recognized by the public in general.[4]

[4] In his brief (page 5) the Secretary notes that the court took judicial notice that a car carrying molten metal should be braked to prevent it from rolling on sloping ground (Tr. 29). The exact language used by the court is as follows:

> However, it seems to me that I might take official notice of the fact that a car carrying molten steel which is disconnected from a locomotive and which may be stationary on a grade, should be braked to prevent it from rolling. *Now how you are going to brake it is another matter, either with mechanical brakes that go with the car or some other means.* * * * (Emphasis added.)

Appendix B—Opinion of Administrative Law Judge.

FINDINGS OF FACT

1. The Respondent corporation is an "employer" engaged in a business affecting interstate "commerce" as those terms are defined by Section 3 of the Act. It is subject to the jurisdiction of this Commission.

2. During the period October 4 through October 8, 1976, Respondent followed the practice of braking "bottle" cars at its North Plant and its Mingo Junction Plant in Steubenville, Ohio, by using wooden chocks or blocks placed under the wheels of said cars in lieu of the hand brakes on the cars.

3. This practice of using chocks was followed in the areas adjacent to the Respondent's furnaces where the cars were filled or unloaded and where the tracks were essentially level.

4. Although there is contradictory evidence on the issue, I find that the Secretary has failed to show by a preponderance of the evidence that the steel industry in general or the general public recognizes that the use of wooden chocks placed under the wheels of said cars in lieu of using hand brakes on the cars is a hazardous procedure.

CONCLUSION OF LAW

Respondent, during the period October 4 through October 8, 1976, was not in violation of Section 5(a)(1) of the Act at either its Mingo Junction Plant or its North Plant in Steubenville, Ohio, as charged in Citations Nos. M4463/456 and M4463/457.

Appendix B—Opinion of Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the Act and Rule 66 of the Commission's Rules of Procedure, it is ORDERED:

That the said citations be, and the same hereby are, DISMISSED. The penalties proposed for these alleged violations are VACATED.

HENRY K. OSTERMAN
Judge, OSHRC

Dated: August 9, 1977
Hyattsville, Maryland

Opinion of Occupational Safety and Health Review Commission

UNITED STATES OF AMERICA

Occupational Safety and Health Review Commission
1825 K Street, NW
(SEAL) Washington, D C 20006

November 24, 1981

IN REFERENCE TO SECRETARY OF LABOR,

v.

Wheeling-Pittsburgh Steel Corp.

OSHRC
DOCKET NO. 76-4807 & 76-4808

OF COMMISSION DECISION
To wit: See Attached.

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

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Appendix B—Opinion of Occupational Safety and Health Review Commission.

FOR EMPLOYER

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FOR THE COMMISSION
RAY H. DARLING, JR.
Executive Secretary

Appendix B—Opinion of Occupational Safety and Health Review Commission.

UNITED STATES OF AMERICA

Occupational Safety and Health Review Commission

SECRETARY OF LABOR,

Complainant,

v.

WHEELING-PITTSBURGH STEEL CORPORATION,

Respondent,

LOCAL 1190, DISTRICT 23, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Authorized Employee Representative.

OSHRC Docket Nos.
76-4807 & 76-4808

DECISION

Before: CLEARY and COTTINE, Commissioners.*

* Chairman Rowland took no part in the decision of this case. Although a new Commissioner possesses the legal authority to participate in pending cases, participation is discretionary and is not required for the agency to take official action. *Perini Corp.*, 78 OSAHRC 43/C5, 6 BNA OSHC 1609, 1611, 1978 CCH OSHD ¶22,772, p. 27,494 (No. 13029, 1978) (Commissioner Cottine's separate opinion). *See* §12(f) of the Act, 29 U.S.C. §661(e). Commissioners Cleary and Cottine reached agreement on the disposition of this case prior to the assumption of office by Chairman Rowland. Participation by Chairman Rowland would therefore have no effect on the outcome of the case and would delay the issuance of the decision. Accordingly, in the interest of efficient decision-making, Chairman Rowland elects not to participate in this case.

Appendix B—Opinion of Occupational Safety and Health Review Commission.

BY THE COMMISSION:

A decision of Administrative Law Judge Henry K. Osterman is before the Commission for review under 29 U.S.C. §661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 ("the Act"). In that decision, Judge Osterman concluded that Respondent, Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh"), had not violated section 5(a)(1) of the Act, 29 U.S.C. §654(a)(1). The Secretary filed a petition for discretionary review that raised the following issue:

> Whether the Administrative Law Judge erred in vacating the citations alleging violations of section 5(a)(1) of the Act for [Wheeling-Pittsburgh's] failure to use hand brakes on its railroad cars used to transfer molten metal?

Commissioner Cleary granted the Secretary's petition for discretionary review.[1] We reverse the Judge's decision.

I

Wheeling-Pittsburgh manufactures steel in Steubenville and Mingo Junction, Ohio. The Steubenville facility is referred to as "the North Works"; the Mingo Junction

[1] Local 1190, District 23, of the United Steelworkers of America ("the Union") filed an untimely petition for discretionary review. We note that before the hearing, the judge received the Union's letter electing party status. The judge did not notify either party of the Union's election of party status. At the hearing, the judge failed to ask if an employee representative was present. We treat the Union as a party under Commission Rule 20(a), 29 C.F.R. §2200.20(a). *Reynolds Metal Co.*, 79 OSAHRC 4/A2, 7 BNA OSHC 1042, 1979 CCH OSHD ¶23,295 (No. 78-2485, 1979).

facility is called "the South Works." A compliance officer of the Occupational Safety and Health Administration ("OSHA") inspected the North and the South Works from October 4 to 8, 1976, as a result of an employee complaint.

The compliance officer testified that Wheeling-Pittsburgh uses hot metal transfer railroad cars (also referred to as "bottles" or "torpedoes") to receive molten iron from blast furnaces; the molten iron is then transported in the cars over track to the basic oxygen furnace ("BOF") where it is converted into steel. The bottles are transported over track from the blast furnace at the North Works to the BOF at the South Works, as well as from the blast furnace at the South Works to the BOF at the South Works. The bottles are shuttled between the blast furnaces and the BOF by a diesel powered locomotive, which pulls from one to five cars at a time. The bottles weigh about 100 tons when empty and at least 300 tons when full.[2]

[2] The Secretary maintains in his brief that the judge incorrectly found from the testimony of the compliance officer that the bottles weigh 50 tons when empty and 100 tons when full. The judge did misconstrue the compliance officer's testimony with respect to the weight of each bottle when full. The compliance officer testified that the capacity of the cars was 100 tons; the judge erroneously believed that the compliance officer was speaking of the total weight of a loaded bottle. In arguing that the empty and full weights of the bottles are 100 and 300 tons respectively, the Secretary relies upon specifications in a blueprint of a bottle that the judge admitted into evidence (Ex. R1), and upon the testimony of Wheeling-Pittsburgh's general superintendent of transportation at the North Works that a bottle weighs about 100 tons when empty and over 300 tons when full. After examining the record, we find that the judge misinterpreted the evidence on this point.

Appendix B—Opinion of Occupational Safety and Health Review Commission.

The bottle cars are 53 feet long from coupler to coupler; the molten metal vessel (the ladle) is about 33 feet long and 11 feet in diameter at its widest point. The ladle is shaped roughly like an elongated football. Each car has four trucks (wheel assemblies), each truck having four wheels. The cars were manufactured with a mechanical, hand-operated brake at each end, but the brakes on 19 of the 22 cars in both plants were either not used or not in good repair. The handles and pins on some brake mechanisms were missing. On other brake mechanisms, the chains were disengaged. Finally, even if the brakes were applied, some brake shoes would not contact the wheels.

In order for the bottles to receive the molten iron from the blast furnace, the locomotive brings each bottle, one at a time, up to the pouring platform and under a spout. The area where the bottles are "spotted" (stopped at a particular spot under the spout) to receive the molten iron is called the "iron alley." A train crew consisting of an engineer and two groundmen spot the car under the spout. Once the bottle is spotted, the groundmen normally place one wooden chock behind one wheel of the bottle to brake it. A chock is a piece of wood ¾ inches thick, three inches wide and 12 to 18 inches long. After the wheel is chocked, the locomotive is disengaged, and the bottle is then filled with molten iron. The locomotive is then returned to be re-engaged with and to transport the full bottles to the BOF.

On one occasion, an employee placed his body between the bottle and the locomotive to uncouple the two. Compliance officer Maglicic testified that if the locomotive

had moved while the brakes of the bottle were not set, the employee could have been injured. Mr. Maglicic had been employed by the U.S. Steel Corporation for 6 and one-half years before joining OSHA. While at U.S. Steel, he spent about half his time on safety matters. He attended a four week course dealing with principles of accident prevention and an OSHA course on hot metal operations in foundries. He had observed bottle cars in operation during the summer of 1964 while he was employed by Republic Steel as a helper in the open hearth furnace department.

The compliance officer also testified that some of the couplings were not tight, that the bottles often moved slightly while still coupled to the locomotive, and that a movement of even an inch could cause an employee's hand to be caught between the chock and the wheel. If the brake were set first, he testified, the bottle would not be as likely to move. The compliance officer also testified that bottles were spotted at other places as well, including a repair shop, and that employees worked in the yard and moved freely about. The compliance officer did, however, testify that the iron alleys are narrow, and that only about 15 to 18 inches of space may be between a bottle and the alley wall. At the North Works blast furnace, this situation creates a tight space that on some models of bottle cars makes it dangerous for the groundmen to set the hand brakes. At the South Works blast furnace, one of the two brakes would not be near a wall and could be set without danger.

Appendix B—Opinion of Occupational Safety and Health Review Commission.

Mr. Chappano, a conductor on bottle trains, performs various tasks, including chocking and setting brakes. He testified that chocks do not always prevent bottles from moving. He testified that sometimes when a bottle is only partially filled, the molten metal sloshes back and forth within the ladle and causes the bottle to move. The movement of the bottle sometimes crushes the chocks and the bottles move off on their own, sometimes as much as three or four hundred yards. At these times, he would have to chase the bottle with a locomotive and try to couple it. When the bottle is coupled, the change in speed will cause molten metal to slosh out. Mr. Chappano also testified that setting one of the two brakes on a bottle is sufficient to prevent movement.

Mr. Nichols, a locomotive engineer, testified that chocks sometimes fail to hold the bottles in place because the bottles either run over or push the chocks. He testified that if brakes were used, this problem would not exist. Mr. Ragan, who works as a brakeman on the bottles, testified that on one occasion two coupled bottles had gone over their chocks when the locomotive contacted but failed to couple with them. The cars were stopped after the conductor ran alongside and set one of the brakes; if the brake had been inoperable, the bottles would have hit a bumping block and might have spilled molten metal.

Mr. D'Albenzio is a locomotive engineer, union representative and safety committeeman in the Transportation Department. He testified also that bottle cars will move over their chocks if coupling is unsuccessful and that the cars would have to be chased with

the locomotive. He also testified that bottles move on inclines even after being chocked.

The Secretary issued to Wheeling-Pittsburgh two citations with two items each alleging violations of section 5(a)(1) of the Act. The items alleged that brakes on bottles used to transport molten metal were not set when the bottles were spotted and that the brakes on these bottles were not properly maintained to assure that they were in working order. The Secretary proposed a penalty of $1,000 for each alleged violation.

Judge Osterman vacated both citations because he found that the Secretary failed to show "that the steel industry in general or the general public recognizes that the use of wooden chocks placed under the wheels of 'bottle cars' in lieu of using hand brakes on the cars is a hazardous procedure."

II

The Secretary argues on review that the judge erred in vacating the two 5(a)(1) citations. He contends that the hazard here "involved the possibility that molten metal cars with inoperable hand brakes either would break loose from their chocks and roll through an area in which employees were working, or would move laterally [*i.e.*, from side to side] in such a way as to permit the spillage of molten metal." The Secretary argues that free-rolling cars could jump the tracks, spill molten metal or ram other cars and thereby endanger nearby employees. He also argues that lateral movement of the cars could not only spill molten metal but crush an employee while he is

setting a chock, and that the lateral movement could occur even on level track. Furthermore, the Secretary argues on review that the record establishes that the hazard was "recognized" within the meaning of section 5(a)(1). The Secretary cites the testimony of two former steel company employees that other steel companies use hand brakes together with chocks to prevent railroad cars from rolling free. He also maintains that he has not cited Wheeling-Pittsburgh for using chocks, but for not using brakes. He has no objection to the use of chocks as a precaution in addition to brakes.

Wheeling-Pittsburgh argues on review that "there was no proof that the employer [or the steel industry] recognized the absence of brakes on the 'bottles' as a hazard." It further argues that setting brakes would itself be hazardous.

III

In order to establish a violation of section 5(a)(1) of the Act, the "general duty clause," the Secretary must show that an employer failed to render its workplace free from a recognized hazard, the occurrence of an incident is reasonably foreseeable, and the likely consequence in the event of an incident is death or serious physical harm to its employees. *Bomac Drilling, Division of TRG Drilling Corp.*, 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1691, 1981 CCH OSHD ¶25,363, p. 31,547 (No. 76-450, 1981). The Secretary also must demonstrate that there were feasible means available to the employer to abate the hazard. *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

Appendix B—Opinion of Occupational Safety and Health Review Commission.

Wheeling-Pittsburgh maintains in its brief that "the real issue in this case is whether the Secretary of Labor has proved that the absence of brakes on the bottles *per se* constituted a hazard." The judge focused on whether the record shows that "the hazard which allegedly arises from the use of chocks to spot 'bottles' in lieu of hand brakes, is one which is recognized in the industry . . . ." The Secretary, in his brief on review, emphasizes the argument that the steel industry's practice is to use brakes and not rely solely on chocks.

We have held that under section 5(a)(1) a recognized hazard is not defined in terms of the absence of appropriate abatement measures. *Beaird-Poulan, A Division of Emerson Electric Co.*, 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1229, 1979 CCH OSHD ¶23,493, p. 28,459 (No. 12600, 1979). We have also held that section 5(a)(1) may require that feasible protective measures be taken even though such measures are not considered customary in a particular industry. *See Continental Oil Co.*, 78 OSAHRC 63/E1, 6 BNA OSHC 1814, 1816, 1978 CCH OSHD ¶22,903, p. 27,703 (No. 1829, 1978), *aff'd*, 630 F.2d 446, 449 (6th Cir. 1980), *cert. denied*, 101 S.Ct. 1481 (1981); *Southern Railway*, 75 OSAHRC 88/C2, 3 BNA OSHC 1657, 1975-76 CCH OSHD ¶20,091 (No. 5960, 1975). Whether chocks alone, or brakes alone, or brakes with chocks are adequate to protect employees is relevant to whether Wheeling-Pittsburgh has rendered its workplace "free" of the hazard; it is not determinative of whether a hazard exists in the first instance. *See Beaird-*

Poulan, A Division of Emerson Electric Co., 7 BNA OSHC at 1229, 1979 CCH OSHD at p. 28,459. We therefore define the hazard here in terms of the physical agent that would injure employees: the crushing or burning of employees by the uncontrolled movements of bottle cars carrying molten metal.

We find that this hazard existed at both the North and South Works. When a bottle is on an incline and not attached to a locomotive in areas other than in the iron alley, it could roll free and strike employees or splash them with molten metal. Although Judge Osterman found that the track in the iron alleys at both Works were "essentially level," Mr. Chappano and Mr. Kirby (General Yardmaster at the South Works) both testified that there was an incline on the track leading to the No. 5 furnace. Mr. Chappano further testified that during an unsuccessful coupling, the locomotive could push the bottle down the incline, and that in one instance, a bottle traveled 300 to 400 yards before being stopped by a bumping block. We also find that a crushing hazard existed in the iron alleys of both Works when a bottle is on level track. Because metal sloshing inside the bottles could cause them to move and because locomotives could move the bottle while it is being spotted, an employee setting a chock during either of these movements could suffer a crushed hand. Under these circumstances, we also find that it is reasonably foreseeable that a bottle would roll free, or move enough to crush an employee's hand. We also find that the hazard was likely to cause

death or serious physical harm within the meaning of section 5(a)(1).[3]

We also find that this hazard was recognized within the meaning of section 5(a)(1). A hazard is "recognized" within the meaning of section 5(a)(1) if it is a condition that is known by the industry in general or by the employer in particular to be hazardous. *See Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC*, 579 F.2d 378, 383 (6th Cir. 1978); *National Realty & Construction Co. v. OSHRC*, 489 F.2d at 1265 n.32. The record shows that Wheeling-Pittsburgh as well as other steel companies recognize the hazard of bottles rolling free. That they took some measures such as chocks or hand brakes, or both, to protect against this hazard, demonstrates that the hazard was recognized within the meaning of section 5(a)(1). *See Royal Logging Co.*, 79 OSAHRC 84/A2, 7 BNA OSHC 1744, 1750-51, 1979 CCH OSHD at ¶23,914, p. 28,997 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9th Cir. 1981); *Beaird-Poulan, A Division of Emerson Electric Co.*, 7 BNA OSHC at 1229, 1979 CCH OSHD at p. 28,459 n.10.

The remaining issue, therefore, is whether Wheeling-Pittsburgh rendered its workplace "free" of the recogniz-

[3] Commissioner Cleary finds that it is inappropriate to inquire into whether an incident is reasonably foreseeable in determining whether an employer violated §5(a)(1). *Bomac Drilling, Division of TRG Drilling Corp.*, 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶25,363 (No. 76-450, 1981) (Cleary, Commissioner, concurring). *See also Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96 (2d Cir. 1981). He would find a violation of section 5(a)(1) of the Act in this case without recourse to whether an incident is reasonably foreseeable. However, Commissioner Cleary agrees to follow the precedent in *Bomac Drilling* for the purpose of deciding this case.

ed hazard. The evidence establishes that Wheeling-Pittsburgh's use of wooden chocks to brake cars did not free the workplace of the hazard. On the contrary, the testimony demonstrates that chocks were easily crushed by the weight of the bottles and that bottles rolled free despite the chocks.

There is some question, however, about the feasibility of the abatement method suggested by the Secretary—the use of brakes. Although there is no question about the usefulness and the feasibility of using brakes in locations other than the iron alleys,[4] there is evidence that the use of brakes is hazardous on some models of bottle cars spotted in the iron alleys because the available working space is too narrow for employees to safely set the brakes on one or both sides of the bottle. Such evidence is relevant to the issue of feasibility. *See Royal Logging Co.*, 7 BNA OSHC at 1751, 1979 CCH OSHD at p. 28,997. There is also evidence that setting one brake in the iron alleys reduces but does not eliminate the hazard.[5] The Secretary has met his burden

[4] Brakes were used at Wheeling-Pittsburgh under a previous supervisor. In addition, Rule 30 of Wheeling-Pittsburgh's Yard Switching Department Safety Rules states that brakes should be used on inclines. Other steel employers use hand brakes. Mr. McCready, Wheeling-Pittsburgh's general superintendent of transportation at the North Works, testified that if only one brake were set the bottle would not be entirely secured against movement because it would affect only the wheels on one truck rather than both. He did not, however, testify that setting one brake would not reduce the hazard at all. Also, as the Secretary correctly points out, Mr. McCready's testimony is largely founded on the erroneous assumption that chocks could never be used as an additional precaution.

[5] As we have noted above, a single brake was used on one occasion to stop a runaway bottle. A conductor on bottle car trains also testified to the usefulness of applying a single brake.

of establishing the feasibility and likely utility of setting brakes in most situations. Accordingly, we affirm the citations for those situations in which one or both brakes can safely be set. Where employees have safe access to both brakes, both must be set. In addition, the brakes must be maintained. We vacate the citations for those situations in which it is too hazardous to set any brake.

IV

We now turn to the assessment of a penalty.[6] Wheeling-Pittsburgh is the ninth largest steel maker in the United States and has approximately 5,000 employees at both locations. The gravity of the violation is relatively high. The record shows that a large number of employees would be exposed virtually all day long to the hazards presented in this case. As to good faith, the record indicates that Wheeling-Pittsburgh made little effort to maintain the bottle car brakes in working condition even though employees repeatedly complained about their condition. Although the compliance officer testified that Wheeling-Pittsburgh has a history of previous violations, the record shows nothing of their nature. Under these circumstances, we assess a $1,000 penalty for each violation.

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[6] Section 17(j), 29 U.S.C. §666(i), provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

Accordingly, we affirm in part and reverse in part the judge's decision, affirm in part and vacate in part the citation as indicated above, and assess a total penalty of $2,000.

SO ORDERED.

FOR THE COMMISSION
RAY H. DARLING, JR.
Executive Secretary

Dated: NOV 24 1981

APPENDIX C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3015

WHEELING-PITTSBURGH STEEL CORPORATION,

v.

SECRETARY OF LABOR.

(D.C. Civil Nos. 76-4807 and 76-4808).

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and LORD, *District Judge**.

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

JOHN GIBBONS
Judge

DATED: AUG 24 1982

* As to panel rehearing only.

APPENDIX D

Opinion, *Secretary of Labor v. Inland Steel Company*

UNITED STATES OF AMERICA

Occupational Safety and Health Review Commission

SECRETARY OF LABOR,

Complainant,

v.

INLAND STEEL COMPANY,

Respondent.

OSHRC DOCKET NO.
79-3286

Appearances:

Gerald C. Moton, Esq., for Complainant

Lewis D. Beckwith, Esq., and Karl J. Stipher, Esq., for Respondent

Lawrence M. Mann, Esq., for United Steelworkers of America

DECISION AND ORDER

On June 14, 1979, respondent, Inland Steel Company (Inland), was cited for willful violations of the "general

duty clause" of section 5(a)(1)[1] of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§651, *et seq.*, and for repeated violation of section 5(a)(2)[2] of the Act, by failing to comply with the housekeeping standard, 29 C.F.R. §1910.22(a)(1).[3] Inland contested the citations and the assessment of penalties proposed by the Secretary.

The dispute concerns Inland's railway operation at its Harbor Works in East Chicago, Indiana. It is the largest single steel manufacturing facility in North America, employing some 24,000 persons, and comprising 2,500 acres, 50 miles of roadway, and 150 to 175 miles of railway track. About 800 persons are employed in the transportation department. During the course of intraplant movement of goods, ranging from raw materials to finished product, Inland uses some 3,000 railroad freight cars and other rail equipment, including 1,400 open-top gondolas, 390 hopper cars, 500 ingot buggies, 286 stake cars, and lesser amounts of such cars as flat cars, pugh ladles, double pot frames, pan cars, pilot cars,

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[1] Section 5(a)(1) of the Act, 29 U.S.C. §654(a)(1), provides:

> Each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

[2] Section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), requires each employer to "comply with occupational safety and health standards promulgated under this Act."

[3] 29 C.F.R. §1910.22(a)(1) reads:

> All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

and ingot mold cars. In addition, several hundred "foreign" cars come into or are handled in Inland's yards every day.[4] Within the confines of the Harbor Works complex, there are several yards where freight cars are assembled, sorted and distributed, and where scrap materials are loaded and unloaded. Generally, the topography of the yards are curved inward or "dish-shaped" enabling cars to be "kicked" into motion so that the cars travel freely down a grade and over switching points until they come to a standstill at their appropriate berth. Inland's freight cars used for intraplant transport are not equipped with power or hand brakes.

Normally, the open-top gondolas are used to carry scrap metal, the loading and unloading being done by electromagnets used with overhead cranes that handle up to 60 tons of scrap in a single load (Tr. 2052, Exh. U-6). During the course of an OSHA inspection conducted by compliance officer Michael Gigli in May and June 1979, twenty-nine open-top gondolas located in several yards were found to be defective because of such conditions as missing uncoupler devices, broken yokes, and broken or crushed handholds.[5]

The Secretary contends that Inland violated the general duty clause of the Act by: failing to "prohibit" or prevent employees from going between the ends of the freight cars in order to manually open defective couplers;

[4] A "foreign" car is one which is owned by a railroad carrier engaged in interstate commerce and which is subject to the laws and regulations administered by the Federal Railroad Administration.

[5] The Secretary presented no evidence as to three other gondolas listed in the citation among the alleged defective cars.

failing to maintain cars free from defects; and failing to enforce its own safety rules regarding defective cars. The Secretary further contends that Inland violated the general duty clause because its freight cars were not equipped with hand brakes. Inland is also charged with breach of the housekeeping standard for failing to maintain its yards free of excessive amounts of scrap metal and wood debris.

DEFECTIVE CARS

Initially, the Secretary charged Inland with three separate violations of the general duty clause in connection with defective freight cars: failure to "prohibit" or prevent employees from going between the ends of cars to manually open defective coupling devices; failure to maintain cars free from defects; and failure to enforce safety rules relating to defective cars. During the course of the hearing the citation was amended by consolidating the three items into a single charge of willful violation of the general duty clause, for which the Secretary proposes a $10,000 penalty be assessed (Tr. 1080, 1088).

The fatal injuries sustained by one of Inland's employees, Anthony Corona, on April 25, 1979, triggered the OSHA inspection of Inland's plant railway operations. Corona was employed as a conductor and, at the time of the accident, was engaged in switching gondola cars when he was crushed between two cars. Inland's investigation of the accident disclosed that one of the two cars lacked a pin lifter and had a tilted drawbar (Tr. 98, Exh. C-5); it was theorized that while Corona was attempting to open the coupler knuckle of one of the cars,

he failed to observe Inland Safety Rules No. 4 and No. 43 (Tr. 89-90, Exhs. C-5, C-27).[6] Two days previously Corona was observed walking between cars with only a 4-

[6] Inland's Safety Rules for Transportation Department, Switching Division, February 1975, Rules No. 4 and No. 43 read as follows (Exh. C-27):

> 4. Conductors and switchmen must report all defective equipment to their Yardmaster.
>
> Inland bad order cars carded bad order by car repairmen or found bad order by switch crews, yardmaster, etc. must be set direct to the Rip Tracks unless the car has to be unloaded first before it can be repaired. In these cases special switches will be made to expedite the unloading and the subsequent setting of the car empty to the Rip Tracks.
>
> Bad order foreign empty cars are to be set outbound as soon as possible. Bad order foreign loaded (inbound) cars are to be set for unloading as soon as possible and then set outbound empty immediately when released. Exception—Foreign cars with broken drawbars are to be set aside in the plant for "I.H.B." or "J" to repair.
>
> Red "bad order" cards signify major defects. A car with a red card must not be moved unless authorized by the Trainmaster or Asst. Superintendent and then it must be handled carefully to specific destination.
>
> 43. ADJUSTING DRAWBARS
>
> Before stepping between cars to open knuckles, adjust drawbars and etc., the cars must be at a complete standstill and a 20 foot opening between the cars. Also if there is any question of the cars not being at a complete standstill they must be blocked.
>
> At night when it is necessary to step between cars to work on knuckles, drawbars, etc., switchman must place his lantern on the ground where it can be seen by the other switchmen or engineer. Engineer is not to move the cars while the lantern is on the ground.

foot opening. Corona died before a formal notice was sent out warning him that he was subject to disciplinary action should he again violate Safety Rule 43 (Exh. R-28).

Compliance officer Gigli testified that in his search of accident records, extending back to 1960, he found that there were eight fatalities "related to rail cars," at least two of which involved defective cars or "pin lifters" (Tr. 833). The only other fatality besides Corona which is alleged to have involved a defective car was that of C. M. Stubbs, a switchman, who was killed in 1960 as a result of being pinned between two cars during switching movements (Exh. C-2a). However, whether the Stubbs case in fact entailed a defective car remains questionable (Tr. 1837, 1839).

The Secretary also points to a number of serious injuries that have occurred over the years as evidence that Inland has been derelict in its safety obligations: In October 1965, H. Holland, a conductor, sustained multiple injuries while opening knuckles between two cars, reportedly in violation of Inland's Safety Rule No. 17;[7] in December 1967, L. Schutz, a switchman, sustained a fracture of the pubis when he was pinned between two cars while attempting to open a knuckle (Exh. C-43); in August 1969, C. Bastardo, a switchman, sustained a foot injury when a foot stirrup broke on the car he was riding

[7] Safety Rule No. 17, which appears in Inland's Safety Rules for Transportation Department, Switching Division, November 1964, contains the same language as Inland's Safety Rule No. 43 issued in February 1975, *supra* note 6 at page 4.

(Exh. C-44).[8] In the Holland case, a pin lifter rod and lever were missing from one of the two involved cars. In the Schutz case, there is no evidence to show a defective car was involved.

What we should note in particular at this point is that the loading and unloading of the open-top gondolas with heavy scrap metals inevitably causes damage to the body of the cars and to their component parts such as grab irons or handholds, foot stirrups, couplers, and uncoupling levers or "pin lifters." Any car that has defective equipment, whether it be a safety appliance, mechanical or structural part, is considered a "bad order" car and, according to Inland's Safety Rule No. 4, *supra* note 6, at page 4, must be set direct to the "Rip Tracks" for repair unless the car has to be unloaded first before it can be repaired; in which case the unloading is to be expedited and the car then set to the "Rip Tracks" for repair.[9] In most cases bad order cars are found by field repairmen during regular inspections and oiling rounds. The field repairmen work in two-man crews, one person on each side of the track. If a car is discovered to be defective, the car is tagged with a bad order card. In cases where switch crews find a bad order car, it must be

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[8] The Secretary also introduced into evidence an investigation report indicating that in March 1964, L. Wallace, a "coal bridge helper," lost four fingers of the left hand while blocking a coal tripper car on coal bridge. Both the coal tripper car and coal bridge are specialized coal handling equipment outside the purview of Inland's transportation department (Tr. 2804-2812, Exhs. C-47, R-4—R-7).

[9] "Rip Track" is a track designated in each yard where cars are diverted for repair by the car repairmen (Tr. 277).

reported to the yardmaster for repair. Safety meetings are held with switch crews upon commencement of the work day (Tr. 281, 2158-2164).

Inland's safety rules and practices are communicated to its transportation department employees primarily through supervisory personnel who themselves must undergo 18 months of safety training. A vital element in the safety program is the job safety analysis (JSA), a procedure designed to identify the hazards or potential dangers associated with each step of a job and to point out to the employee the proper procedure to follow in order to accomplish the task at hand and avoid the potential hazard. Another vital element in the safety program is "safety observation," the purpose of which is observing employees do their jobs in order to find out whether or not they are working their jobs safely. Generally, a discussion is held between the supervisor-observer and the employee upon completion of the observation and a "safety contact" record is maintained (Tr. 2230-2242, Exhs. R-23—R-26).

The fundamental proposition that underlies the whole argument for the Secretary is that Inland's safety program for the transportation department exists for the most part on paper, and that Inland's safety performance has failed to live up to the requirements of the general duty clause. In support of this argument the Secretary presented several witnesses, who are either current or former employees of Inland. Kenneth Gillie, employed by Inland for some 20 years as a conductor, testified, in substance, that he regularly opened couplers manually—the uncoupling levers being either missing or defective—and that although he realized the dangers of

this practice, he was compelled to do it because otherwise he would have been subjected to "constant harassment." The harassment, he explained, took the form of disallowing him either "a lunch period," one-hour earlier quitting time or assignment to a preferential job (Tr. 325-326, 414).

Mr. Gillie testified further that over a period of about two years, he had been the subject of a "safety contact" only 2 or 3 times, that some yardmasters (or foremen) record entries in safety contact records without actually having had any safety interview or contact with employees, and that until the present OSHA enforcement proceeding, he was unaware of Inland's Safety Rule No. 60.[10] Mr. Gillie named Martin Dills as a "foreman" who openly admitted to falsifying safety contact records (Tr. 325, 389, 396, 450, 487-492).

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[10] SAFETY NOTICE
[May 17, 1977]
PULLING PINS

Recently an accident occurred to a #4 BOF employee when he attempted to lift a pin by hand without using the cut lever. Also many of the trucks on the new cars have been moved to the very end of the car with the wheels closer to the end sill than older type cars. Consequently the hazard of stepping in between cars has increased greatly. It is important to review our method for pulling pins safely.

The following new Safety Rule will be effective immediately.

SAFETY RULE #60

Under no circumstances will switchmen be permitted to lift pins by hand without using cut levers.

1. When cut lever is missing or inoperative switchman must cross in a safe manner to the other side of the train and pull the cut lever on the other car.

2. If cut levers are missing or inoperative on both sides of the train the cars must be set out as bad orders for car repair to replace or repair cut levers (Exh. C-9).

Mr. Gillie's testimony is strikingly unconvincing. Time and time again he displayed bias against Inland, particularly in his demeanor and the manner in which he responded to questions on cross-examination. The major points of incredibility in his testimony include the alleged incidents of being harassed by Inland's supervisors if he failed to undertake the dangerous practice of lifting pins by hand (Tr. 412-415, 429); the alleged lack of knowledge concerning Inland's Safety Rule No. 60 which prohibits that very practice (Tr. 470-472); the amount of defective cars alleged to be as much as 70 percent and his claimed efforts to alleviate the problem (Tr. 330-335, 467-468). It is significant to note that although he had held the responsible jobs of "union griever" and "safety committeeman," neither Mr. Gillie nor any other conductor or switchman has asserted his rights under Article 14, section 6, of the collective bargaining agreement concerning defective cars (Tr. 425-428).[11] It is also note-

[11] Agreement between Inland and United Steelworkers of America, Article 14, section 6 (Exh. R-1), provides:

> Disputes. An employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question shall discuss the complaint with his or their foreman. Following such discussion, the oral disposition form provided for in Step 1 of Section 3 of Article 6 shall be immediately prepared, signed, and distributed as therein provided. If the complaint remains unsettled, the employee or group of employees shall have the right to: (a) file a grievance in Step 3 of the grievance procedure for preferred handling in such procedure and arbitration or (b) relief from the job or jobs, without loss to their right to return to such job or jobs; and, at the Company's discretion, assignment to such other employment as may be available in the plant; provided, however, that no

(Footnote continued on following page)

worthy that despite his professed concern regarding defective equipment and its hazards, Mr. Gillie failed to take any action on Inland's offer of establishing a joint union-management committee to investigate the problem of bad order cars, which was raised by Mr. Gillie himself in an October 1978 "Safety Agenda" while Mr. Gillie was acting as a safety committeeman (Tr. 435-437, Exh. C-1).

Perhaps the most telling part of Mr. Gillie's testimony occurred on cross-examination and again on redirect examination when he was questioned regarding the lifting of pins by hand without using "cut levers" (a hazardous procedure prohibited by Inland's Safety Rule No. 60) which Mr. Gillie stated he had done on occasion in the presence of his supervisors. When pressed by Inland's counsel to state the names of such supervisors, he specified several persons who had been retired from Inland's employ some years ago. He refused to state the names of supervisors currently employed by Inland "because then the company would come down on them" (Tr. 452). On redirect examination, Mr. Gillie's fears of revenge widened somewhat in scope (Tr. 485):

(Footnote continued from preceding page)

> employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job. Should either the Management or the arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the employee not have been assigned to other available equal or higher-rated work, he shall be paid for the earnings he otherwise would have received.

> Well, if I name names, the company is going to get all over them and say, "You seen this happen. Why didn't you do something about it? Why didn't you get on the guy?" And they are going to be upset at me and they are going to come back at me on it. And then it's going to be miserable for me for awhile.

Surely such testimony goes to support Inland's position rather than the Secretary's on the question of safety enforcement. Moreover, one can hardly take Inland to task when an employee refuses to notify responsible personnel of a hazardous situation because it may result in appropriate disciplinary action being taken against another employee.

Following Mr. Gillie, the Secretary called Martin Dills, presently employed by Inland as a switchman-conductor; during the period 1976-1978 he worked as an "hourly foreman."[12] Mr. Dills testified that on occasion he had violated Inland's safety rules because he wanted to "get the job done," which resulted in reaping such benefits as longer lunch periods and "earlier quitting time" (Tr. 570-571). He also admitted to filling out safety contact cards in a manner which he knew to be improper in order to "save time" (Tr. 547). Mr. Dills' testimony as to whether other supervisory personnel falsified safety contact cards is so inconsistent as to lack credibility (Tr. 549-551). When questioned by Secretary's counsel regarding his claimed experiences in being subjected to harassment by Inland's supervisors, he described an incident which occurred three weeks previously and which has no

[12] As previously noted, Mr. Dills was named by Mr. Gillie as the foreman who admitted to falsifying safety contact records.

substance. Indeed, it ended with Mr. Dills' visit to Inland's health clinic, his subsequent sick leave of two days followed by his uneventful return to his regular job (Tr. 571-578).

John Mathis, who has been employed by Inland for 26 years, most recently as a locomotive engineer, testified for the Secretary regarding an episode of being "disciplined for working too slow" (Tr. 584-589). His testimony on this point was so vague as to be of no probative value. He also testified that he frequently came upon bad order cars which were reported "all the time" (Tr. 590).

Martin Connelly, retired since March 1979 after 27 years of employment in Inland's transportation department as a switchman-conductor, testified that it was not unusual for yardmasters to overlook a bad order car, and that on one occasion a supervisor directed him to use bad order cars (Tr. 1216-1218, 1244, 1247). However, the following colloquy on cross-examination seriously undermines the import of Mr. Connelly's statements (Tr. 1339-1340):

> Q. I believe you testified that you had been ordered to pick up some bad order equipment once by a yardmaster, is that correct?
> A. Yes.
> Q. That was Mr. Lambert?
> A. Yes.
>
> * * *
>
> Q. When was that?
> A. Oh, I would say when I was working on the day turn, the lakefront yard in the period of '72 to '75 or '76.

Q. What did you do about that, if anything?
A. I protested.
Q. Was there an agreement or what?
A. No.
Q. Never filed a grievance?
A. No.
Q. Never invoked your rights of Part 14 of the union contract?

A. I think it is important for you to realize that—for you to understand that the condition of working with a yardmaster is one on one relationship that you not only work as a master servant, but you also recognize the duress that he is under, and you will cooperate in doing work and that you will help the plant out because of conditions.

Jim Lambert had a heart attack and was under very severe pressure to stay on the job, and we bent over backwards to keep Jim Lambert without stress or strain. When he asked me to pick up these cars, I protested. I told him, "Jim, they are bad. They shouldn't be used, and I don't want to set them."

He implored, and I agreed on the condition that these cars immediately upon being removed from the mill, would go to the bad order track. Somebody pulled them, and, of course, didn't know about our agreement. . . .

Jeffrey Warner, presently employed by Inland for two years as a switchman and locomotive engineer, testified that when he was given safety training as a switchman he was taught not to lift pins by hand without using cut levers, and to report bad order equipment; but he was also shown by his supervisor, William Murray, how to "save time and trouble" when uncoupling cars with defective pin lifters by stepping between cars and pushing the pin lifter with a wooden block. This information

was imparted by Mr. Murray "off the record." Mr. Warner testified further that although he knew it to be a dangerous practice, on many occasions he uncoupled cars with defective pin lifters by using a wooden block or some other object because if he failed to do so his supervisor would see to it that "You would end up doing more than your share of work." Mr. Warner also testified that there were occasions when he reported bad order cars which continued to be placed in service because they were needed at that time (Tr. 1419-1422).

William Murray denied teaching Mr. Warner to uncouple cars with defective pin lifters in violation of Inland's Safety Rule No. 60 (Tr. 2920). Mr. Warner disclosed on cross-examination that he acted in contravention of Rule 60—thereby risking his life—merely to get the benefits of a longer lunch period and a lighter work load (Tr. 1448-1452). When questioned on cross-examination regarding his prior testimony of two incidents when bad order cars were kept in service despite his reporting them to be defective, he gave a somewhat conflicting account: With respect to the first incident, he stated on direct examination that there were two adjoining cars and both were defective (Tr. 1422); but on cross, he stated that only one car was defective, the defective car was loaded and set to the mill for unloading (Tr. 1435-1436). There is nothing to suggest that in uncoupling the cars, Mr. Warner was not able to "cross in a safe manner to the other side of train and pull the cut lever on the other car" as required by Rule 60. Mr. Warner had previously testified that he did not know what happened to the car after it was reported to be defective and set to the mill for unloading

(Tr. 1423). When asked on cross-examination about the second incident of being directed to use bad order cars, Mr. Warner's response indicates that he may very well have been requested to do nothing more than remove defective cars from a train so that they could be set direct to the Rip Track for repair (Tr. 1437).

David Thedford, employed by Inland for 24 years and presently working as a switchman-conductor, was called by the Secretary and testified that over the years he has worked with cars with defective cut levers (or pin lifters) and has had to step between cars to lift pins by hand, and that he had seen yardmasters as well as other employees do the same thing. He testified further that on one occasion, while acting as safety steward and "making a special effort to locate bad order equipment," he reported several cars as being bad order and "two or three days later" he saw "a couple of them" still in the same defective condition. Mr. Thedford realized that stepping between cars to lift pins by hand was hazardous but "these were some of the bad habits you pick up" (Tr. 1569, 1577-1578, 1593). Apparently, Mr. Thedford's overriding concern was the carrying out of job assignments without delay, which, at times, required him to disregard safety rules (Tr. 1579-1580). When asked by Inland's counsel what he thought the consequences would be should a job assignment be delayed because he complied with a safety rule, echoing a familiar refrain, Mr. Thedford responded, in pertinent part, as follows: (Tr. 1580-1582):

> You might get a little harassment from the yard manager . . . .

> Well, not—when I say "harassment," you could say this: You know, usually, if you get twenty minutes for lunch and a guy does a pretty good job, he might get thirty-five, forty minutes for lunch or maybe an hour. And if you are a type of guy they seem to think you are delaying the job, you just might get your twenty minutes . . . .

In a letter dated June 29, 1979, Mr. Thedford, then holding the office of safety steward, notified the assistant superintendent of the July 1979 safety agenda which, among other things, referred to:

> Bad order equipment has reduced quite a bit. Over one hundred and eighty (180) cars repaired within the week.
>
> The problem of bad order equipment still is a major problem.
>
> (a) Rules four (4) and forty-three (43) should be impressed to [sic] the men.

Mr. Thedford ended his letter with some "comments," including the following:

> I received a report from the car repair department on progress being made in repairing *Bad Order* equipment for the week of June 17-23. A total of 181 cars have been repaired. I think our supervisors are doing a fine job in helping us have safe equipment to work with. There is still a lot of bad order cars. We have safety rules to help us determine how and when to know bad order cars that are unsafe.
>
> Rule Four (4) and Forty Three (43) our work area [sic] is important to our health, and safety. There are a number of things, we can do to help (Exh. R-8). (Emphasis in original.)

Howard Holland, who retired in early 1975 after working 29 years in Inland's transportation department, testified that when he began his inspection he randomly knuckles was "something that occurred every day" for a time until "someone gets hurt out there" and then "they get pretty strict for a while" (Tr. 1620-1623). Although these statements clearly imply that Mr. Holland was aware of a safety rule prohibiting employees from manually opening knuckles, when he was asked by Inland's counsel whether during his employment Inland had "a rule against opening a knuckle that was missing a pin lifter," Mr. Holland equivocally replied: "I never saw it" (Tr. 1627).

What should be noted at this point is the testimony of Michael Gigli, the OSHA compliance officer who inspected Inland's plant railway operations. Mr. Gigli testified that when he began his inspection he randomly selected some of the tracks not in use; that out of a total of 55 cars inspected, about 60 percent were defective and available for use; and that there were "a large number of cars" on repair tracks awaiting repairs (Tr. 949). Mr. Gigli admittedly had no previous experience in inspecting or investigating rolling stock, and he did not possess the knowledge to identify whether the freight cars had any of the defects listed in the citation; instead, he relied on Kenneth Gillie, who accompanied him during the physical inspection, to point out the various defects (Tr. 654, 946-947). Mr. Gigli also acknowledged that in the issuance of the citations he did not inquire into the practices and procedures of railroad companies or other steel firms to ascertain either their rate of occurrence of

bad order railway equipment or their car maintenance performance. Nor did he bother to take into account the kinds of materials carried by Inland's freight cars (Tr. 1003, 1007, 1031, 1122-1123).

On the record thus described the Secretary asserts that Inland should be held liable for a willful violation of the general duty clause because it failed in its safety responsibilities of preventing employees from stepping between freight cars to manually open defective couplers, maintaining cars free from defects, and enforcing its own work safety rules for reporting defective cars and removing them from service.

The first step is to make plain what no one seriously disputes—that because of the vast use to which Inland's freight cars are put in the loading, transporting and unloading of large quantities of heavy scrap metal, damage to the open-top gondola cars is an unavoidable fact of life in its steel-making process. This fact has not been brushed aside by Inland, which has promulgated rules and has special work crews for detecting and repairing the damaged cars. Nor is there any question that Inland's transportation department has formulated standards of safety with a discernible order of responsibility flowing down to the individual workman, with primary responsibility extending from the safety director and supervisory personnel to the workmen who serve on safety committees and have a direct means of safety communication. The first-line supervisor or foreman is the key person in the safety program because he is in constant contact with his employees and, presumably being thoroughly familiar with the hazards of the job, he can

provide personal leadership. Another essential feature of the safety program, especially where the work *milieux* comprises such sprawling dimensions as Inland's railroad yard, is the worker's attitudes favorable to safety.

The evidence clearly demonstrates that Inland's employees were well aware of and understood the pertinent safety rules, and they apprehended the importance of following them. However, one salient fact that emerges from the record with persistent repetition is that almost all the switchmen-conductors called to testify for the Secretary chose to disregard the rules for reporting defective equipment and pulling pins safely while uncoupling cars. While professing to have acted under duress of "harassment" by foremen concerned with maintaining or achieving an uninterrupted movement of equipment, in actuality, the employees' actions were governed simply by such self-interests as gaining longer lunch periods and earlier quitting time. There is nothing of substance in the record that would lead us to believe that Inland, through its first-line supervisors or any other supervisory personnel, induced employees by promising any kind of reward to overcome concern for safety or to encourage its employees to turn out more work at the risk of sustaining serious or fatal injuries. Indeed, the credible evidence shows that in dispensing with the rules for reporting bad order cars and pulling pins safely the employees acted on their own initiative, independently of any supervisor's control.

The Secretary maintains that Inland's foreman actively encouraged employees to break the safety rules for handling defective cars, as indicated by the previously

noted testimony of Jeffrey Warner, David Thedford and Kenneth Gillie (Secretary's Brief, p. 24). Their testimony was flatly contradicted by Inland's witnesses in many material respects; and when questioned on cross-examination by Inland's counsel, their account of particular events created a strong impression that they were giving a wrong coloring to material facts so as to deprive them of credit.

Although compliance officer Gigli, during his inspection of "B", "EE" and "F" yards, found that the tracks designated for repair work either were "full of cars" or had "a large number of cars" set for repairs (Tr. 947-950), the Secretary contends that Inland had not been diligent enough in eliminating defective cars from service. Given the wear and tear to which the gondola cars were subjected in the course of their everyday use, what test is to be applied in ascertaining what was required of Inland under the general duty clause? Inland's counsel explored this issue during the following exchange (Tr. 1001-1003).

> Q. Is it your position in this case, Mr. Gigli, that any safety defect that you would locate in a railroad car constitutes a violation of the General Duty Clause?
>
> A. No. If I had gone to Inland Steel Company and inspected these number of cars and found occasional defects and found by interviewing of employees that rules of reporting, taking these cars out of service were enforced and I determined these were isolated instances, I would not have cited them.
>
> Q. In a railroad fleet of 3,000 cars or even 2,200 cars, how many defects would be too many?

A. I really don't know how to answer that question. It would be a judgment. You are assuming that I would inspect 3,000 railroad cars, that I can tell you right now how many cars, about what limit I would say okay, that's an isolated instances. It is a judgment call.

Q. My question is you don't have any experience that would enable you to determine how many defects would be too many in a railroad yard, do you?

A. My experience with industrial equipment leads me to believe, Mr. Beckwith, that this many cars spot checked off a railroad yard, this number of defects and the seriousness of the defects clearly indicates a poor maintenance program, poor repair of cars. There should not be that many defective cars selected on that basis.

* * *

Q. You haven't had any experience with railroad rolling stock either in mainline railroads or at other steel companies, have you, Mr. Gigli, which would enable you to determine what an ordinary and typical amount of bad order cars would be for a railroad yard?

A. I have not inspected—I think I already said I didn't have any experience with rolling stock. I base my judgment on my overall experience in an industrial environment.

The answer given by Mr. Gigli does not provide us with the kind of objectivity needed to qualify as an authoritative standard or criterion by which one may judge Inland's car maintenance program. Due process considerations mandate standards carrying "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

United States v. *Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542 (1947). In *National Realty and Construction Co., Inc.* v. *Secretary of Labor*, 489 F.2d 1257, 1268 (D.C. Cir. 1973), the Circuit Court for the District of Columbia spoke clearly and directly on the point concerning arbitrary enforcement of the general duty clause:

> Only by requiring the Secretary, at the hearing, to formulate and defend his own theory of what a cited defendant should have done can the Commission and the courts assure even-handed enforcement of the general duty clause. Because employers have a general duty to do virtually everything possible to prevent and repress hazardous conduct by employees, violations exist almost everywhere, and the Secretary has an awesomely broad discretion in selecting defendants and in proposing penalties. To assure that citations issue only upon careful deliberation, the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.

In the recent case of *Whirlpool Corp.* v. *OSHRC*, 645 F.2d 1096, 1098 (D.C. Cir. 1981), the District of Columbia Circuit Court reemphasized the basic principles applicable here:

> As OSHA's legislative history makes clear, this subsection [Section 654(a)(1) of the Act] does not impose strict liability on employers, but instead limits their liability to "preventable hazards." The three elements of a general duty violation are: (1) a hazard likely to cause death or serious bodily harm; (2) recognition of the hazard either by the specific employer or generally within the industry; and (3) existence of a feasible method of abatement.

The Secretary has the burden of coming forward with evidence on the feasibility issue. This procedural burden is closely related to the broad sweep of the clause, for proof of the specific method of abatement, perhaps more than the other substantive elements, helps provide the employer with notice of the precise hazard at issue.

It is in the showing of feasible methods of abatement that the Secretary's case is palpably flawed. The Secretary's blueprint for correcting the alleged violations is outlined in the testimony of Compliance Officer Gigli (Tr. 933-934):

Q. Would you relate whether or not you made a determination as to whether there were solutions to each of the hazards that you saw?

A. Yes.

Q. Directing your attention to Willful Serious Citation No. 1, Item No. 1 [failure in preventing employees from stepping between cars to open defective couplers], based upon your evaluation what is a practical solution for that?

A. In my opinion, the only solution would be to prohibit employees, to inform all employees, make it well known to all employees that this practice was hazardous and to prohibit this practice and to continually monitor the employees and to discipline employees upon violation of the procedure.

Q. Directing your attention to Item No. 2 of Willful Serious Citation No. 1 [failure in maintaining cars free from defects], that would be the practical solution to that?

A. The solution would be to repair the defects noted.

Q. No. 3 of Willful Serious Citation No. 1 [failure in enforcing work safety rules for handling defective cars].

> A. Again, this would be a matter of informing employees of the requirement of Rule No. 4 and to monitor their work and determine, insure that they were reporting and to discipline employees found not complying with that rule.[13]

The record readily supports the factual conclusion that Inland's employees had adequate knowledge of the hazards of working with defective cars, including stepping between cars to open defective couplers, and of the pertinent safety rules to be followed for averting those hazards. As previously discussed, the record also demonstrates that in the otherwise orderly procedure for dealing with defective cars, some employees chose to take unnecessary risks by ignoring the safety rules in pursuance of hastening the movement of cars for the sole purpose of achieving longer lunch periods and earlier quitting time.

Pruning the Secretary's abatement recommendations to their essentials, we are left with: "continual" monitoring of employees, disciplining employees for safety infractions, and—for maintaining the cars in safe condition—simply, "repair the defects." With respect to the latter, the Secretary's solution to the problem is patently inadequate. As for the first two points, it should be noted that a switch crew consists of a

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[13] Mr. Gigli's testimony on redirect examination was essentially the same, with one notable exception: he felt that even if repair tracks were full, repairs could be made on "some cars" by "mobile repair facilities" wherever the defective cars might be located (Tr. 1509-1514); and, as for "major" defects, "[Inland] take[s] cars out of service all the time. So, I am simply telling them to continue to do so but at an accelerated rate" (Tr. 1515).

locomotive engineer, a conductor and a helper (Tr. 238).[14] It should also be borne in mind that working conditions change continually, that unsafe conditions could arise at any time, and that the work performed by the switch-crew members necessarily places them from time to time outside one another's view. If the Secretary were to have his way, apparently Inland would be required to employ for every switch crew, whether experienced or inexperienced, at least two, perhaps three, additional employees who would "continually" monitor the working members during every phase of the switching operations in order to ensure compliance with the safety rules.[15] Such method of abatement is unacceptable for several reasons. The word "feasible" means economically and technologically capable of being done. *Baroid Division* v. *OSHRC*, 660 F.2d 439, 447 (10th Cir. 1981); *American Textile Manufacturers Institute, Inc.* v. *Donovan*, _____ U.S. _____, 101 S.Ct. 2478. The Secretary made no attempt to present evidence showing the estimated cost of achieving compliance.

While strenuously arguing that his burden of proving a feasible abatement method encompasses technological but not economic feasibility, the Secretary correctly points out that the Commission has relied on *National Realty, supra*, in establishing the basic criteria for testing the validity of 5(a)(1) citations. (See Secretary's Reply Brief, pp. 7-9.) But the following quote reveals

[14] A "switchman" is a term used for both the conductor and the helper (Tr. 238).

[15] If the Secretary meant something less than such close and continuous monitoring of employees, he failed to indicate as much.

that in the *National Realty* case, the Circuit Court did not exclude economic feasibility from consideration:

> . . . Congress intended to require elimination only of preventable hazards. . . .
>
> Though resistant to precise definition, the criterion of preventability draws content from the informed judgment of safety experts. Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that *conscientious experts, familiar with the industry,* would not take it into account in prescribing a safety program. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or *so expensive that safety experts would substantially concur in thinking the methods infeasible.* (Emphasis added.) 489 F.2d at 1266.

Although the Court went on to refine the phrase, "so expensive," to mean a clear threat to the employer's "economic viability."[16] the Secretary's burden of proving economic feasibility at least within the boundaries of that definition still remains.[17] What's more, because he

[16] This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation. The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Similarly, a precaution does not become infeasible merely because it is expensive. But if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promulgated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause. . . . *Id.*, at 1266 n. 37.

[17] As with other aspects of the general duty clause, Judge J. Skelly Wright's comments on economic feasibility were *obiter dictum*; however, Judge Wright's comments have invariably served as authoritative rules in a number of subsequent cases decided by various Courts of Appeals.

admittedly was not "familiar with the circumstances of the industry," compliance officer Gigli's abatement recommendation lacks probative value. See *General Dynamics* v. *OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979). Congress declared the purpose of the Act is "to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §651(b). (Emphasis added.) To insist that Inland employ the numerous persons needed to conduct continuous on-the-spot safety checks of the switching crews' daily activities would, it seems to me, go beyond the limit of responsibility placed upon the employer by Congress.

HAND BRAKES

The Secretary contends that Inland's policy of using wooden blocks instead of hand brakes is not an "adequate means of braking" because blocks are inadequate to control the speed of "runaway" cars; railroad carriers require the use of hand brakes to hold standing cars because they are effective in securing cars; blocks are not an effective way to secure cars because they are subject to being dislodged by various means; placing a block under a wheel exposes employees to the danger of being struck by a moving car.

The Secretary's view of the central issue in this case suffers from the disorder of double vision. While on the one hand, Secretary's counsel quite correctly asserts that the "recognized hazard" is inadvertent movement of railroad cars, and that Inland had actual knowledge of this hazard, on the other hand, in an apparent refusal to

accept the issue as resolved, he strenuously argues that whether the hazard was "recognized" must be judged against the standards of a relevant industry" (*i.e.*, common carrier by railroad), a point he sets out to prove by extensively citing cases decided by a number of Courts of Appeals (Secretary's Reply Brief, pp. 4-6). The matter is further obscured by Mr. Gigli's testimony that the lack of hand brakes is the "recognized hazard" in question (Tr. 1140), and by counsel's repeated references to hand brakes as the "recognized method" of abatement (Secretary's Brief, pp. 16, 28). Small wonder that Inland was led to believe that the "Secretary's case . . . ultimately rests upon the proposition that a lack of hand brakes is a recognized hazard" (Inland's Reply Brief, p. 7).

The doctrine essential to the solution of the question in issue was lucidly stated in *Magma Copper Co.* v. *Marshall*, 608 F.2d 373, 377 (9th Cir. 1979):

> . . . Where evidence of the employer's actual knowledge is relied on as proof that a hazard is "recognized," under the general duty provision of the Act, the Secretary has the burden of demonstrating by substantial evidence that the employer's safety precautions were unacceptable in his industry, or a relevant industry. We adopt the *General Dynamics Corp.* v. *OSHRC* [*supra*] standard of a reasonably conscientious safety expert familiar with the pertinent industry. . . .

It is neither contended nor demonstrated by the evidence that other steel companies use hand brakes instead of blocks to secure plant railway freight cars. It is conceded that Inland is not engaged in business as a

common carrier by railroad, but the Secretary points to railroad carriers as the relevant industry for establishing that hand brakes and not blocks are the proper safeguard against inadvertent movement of cars. Assuming, *arguendo*, that railroad carriers are a relevant industry, the difficulty here is that the Secretary works under the false assumption that hand brakes are used generally by the railroads without serious limitations. Under the Safety Appliance Act, made applicable to any common carrier engaged in interstate commerce by railroad, it is unlawful to use hand brakes instead of power or air brakes in the ordinary movement of freight trains in interstate commerce.[18] *Virginian Ry. Co.* v. *United States*, 223 F. 748, 751 (4th Cir. 1915). The air-brake requirement does not apply to switching operations. *United States* v. *Erie Ry. Co.*, 237 U. S. 402, 35 S. Ct. 621 (1915). On the other hand, while railroad carriers

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[18] Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. 45 U.S.C.A. §1.

are required to *equip* their cars with hand brakes,[19] there is no statutory obligations to *use* hand brakes in place of any other holding device during switching movements in railroad yards. One of the primary objects of the Safety Appliance Act was the protection of railroad employees from the dangers incurred in manipulating hand brakes:

> The House Committee on Interstate Commerce, in its report on the bill, after referring to the number of train hands killed in falling from trains and engines, said:
>
> "It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers, obviating the necessity of men going between the cars, and continuous train brakes that can be operated from the locomotive, and dispense with the use of men on the tops of the cars; that the locomotive should be provided with power driving wheel brakes, rendering them easy of control. The brakes now have to be largely operated by the

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[19] Safety appliances required for each car; when hand brakes may be omitted

It shall be unlawful for any common carrier subject to the provisions of sections 11 and 16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: *All cars must be equipped with secure sill steps and efficient hand brakes;* all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, That [*sic*] in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. 45 U.S.C.A. §11. (Emphasis added.)

brakemen, traveling over the tops of the cars by night and day, through sleet and rain, exposed to great danger of falling from the cars, or from overhead obstructions."

The chairman of the committee which had charge of the bill in the Senate explained the bill by saying:

"When we get the cars of this country equipped with uniform couplers, with air brakes, so that the men will not be required to go between the cars, so that the men who are on top of the cars to-day will be taken off and thereby relieved from the danger of such positions, there will be no cause for any further legislation on the subject, in my judgment."

The Interstate Commerce Commission also so understood the act. In its Eleventh Annual Report it said:

"The requirement, therefore, is not that a carrier shall equip its cars with the brake or the coupler, but that it shall not use in interstate traffic a train which is not controlled by the train brake."

In its Thirteenth Annual Report the Commission, anticipating the time when the law should go into effect, said:

"The men will not then be obliged to use the tops of the cars for braking, nor to walk on the running boards. The freight train will be as completely under control of the engineer as passenger trains are at the present time."

United States v. *Great Northern Ry. Co.*, 229 F. 927, 929 (9th Cir. 1916).

Whatever advances may have been made over the years in technology, serious risks attending the use of hand brakes persist. Here is what Marshall Sage, the

Union's expert witness, had to say when he was questioned on the subject (Tr. 1691-1692):

> A. To operate any brake, you have to get on the car. That's where your EJ&E safety rules have a very clear definition of how to perform that maneuver of how you get up the side and then cross over safely.
>
> When I say cross over, I mean come around the brake platform on the end of the car.
>
> Q. So, on most cars, even under the new rules, there is a platform on the end of the car on which a brakeman or switchman or conductor operating the brake must stand while operating?
>
> A. On practically all cars, there is.
>
> On auto racks, which are long trailers, flatcars, they can't put them that way. So, on many of them, it is on the side; a very unsafe practice to operate, I might add. But that's the way it is.
>
> Q. To operate these brakes that are on the end of cars, one has to climb up the side and then go around—
>
> A. Move around to the platform.
>
> Q. —move around the ends of the cars on a system of grab irons and stirrups in order to get to the platform?
>
> A. All cars are required to be equipped with these, and that's how you get on and off of a car.

Photographic evidence provides us with a vivid portrayal of the precarious situation employees must contend with when operating hand brakes (Exh. R-9, pp. 39-40). Railroad accident data reveal that getting on and off cars and operating hand brakes are major causes of injury (Tr. 3095-3097, 3110, 3115, Exhs. R-42, U-2b, U-9). Contrarywise, the Secretary has failed to show by any com-

petent evidence that the use of blocks has been the cause of injury to Inland employees.

Generally, railway companies rely primarily on hand brakes to hold cars standing on tracks, but if brakes are inoperative, blocks are to be used. The following rule of the Chessie System is typical of the industry's operating rules on movement of trains (Exh. U-1c):

> 103-F. A sufficient number of hand brakes must be applied to hold cars standing on any track; if brakes are inoperative, wheels must be blocked.
>
> When track is on grade, hand brakes must be applied and, when necessary, wheels must be blocked and cars coupled together, if practicable.

James Martin, Senior Vice President of Operations for Illinois Central Gulf Railroad Company, formerly employed by the Association of American Railroads as operations vice president of maintenance with responsibilities in developing rules and safe practices, appeared as a witness for Inland. Mr. Martin testified that "saucer-" or dish-shaped yards, such as Inland's, allow cars to come to a rest without the application of brakes, and that in most cases hand brakes are not used in dish-shaped switching yards of the railroad industry (Tr. 3088, 3141). Mr. Martin's testimony was not effectively rebutted; indeed, it was substantially supported by the Secretary's own witnesses: Wilder Barnes, who was called as a rebuttal witness by the Secretary, formerly employed for 19 years as a railroad conductor and brakeman and currently employed by the Federal Railroad Administration in its enforcement program, testified that blocks are commonly used in the railroad

industry to hold cars "temporarily" (Tr. 3568, 3595). And Howard Holland, also called by the Secretary, testified that when he was employed by railroad companies, he did not use hand brakes except on "elevated" or inclined tracks (Tr. 1609-1610).

While the use of blocks does have its drawbacks (Secretary's Brief, p. 17), there is ample evidence showing that hand brakes have an equal number of, if not more, objectionable features. Secretary's counsel makes much of the fact that Inland's blocking system does not have the capability to slow or stop moving cars during switching operations (Secretary's Brief, pp. 11-14). But the evidence establishes that Inland's sorting and switching work involves trains of a relatively small number of freight cars which move at a slow rate of speed, and that the speed is adequately controlled by locomotives and the dish-shaped topography of the yard. The Secretary has been at pains to elicit testimony and present arguments in connection with "runaway" cars (Tr. 342-349, 1193-1195, 1206, Secretary's Brief, pp. 11-14). The evidence indicates that having switchmen dismount the car and safeguard road crossings in the path of the "runaway" car, as Inland does, is a safer practice in dealing with the situation than the Secretary's recommended method of requiring switchmen to manipulate hand brakes of a moving car (Tr. 1193-1195). Moreover, there is a specific materials-handling standard, 29 C.F.R. §1910.176(f),[20] that is applicable to the very condition described by the Secretary's witnesses.

[20] 29 C.F.R. §1910.176(f) reads as follows:

> Rolling railroad cars.
>
> Derail and/or bumper blocks shall be provided on spur railroad tracks where a rolling car could contact others cars being worked, enter a building, work or traffic area.

The Secretary failed to address the question of hand-brake maintenance, a vital aspect of the case. While the record does not permit us to calculate with any precision the daily damage hand brakes must necessarily sustain, it is reasonable to assume, at least as to the open-top gondolas (the great bulk of Inland's freight cars), that it would equal if not exceed the damages Inland experienced with other car appliances, thus rendering a substantial amount of brakes unfit for their purpose and necessitating some kind of elaborate inspection and maintenance program.[21] This added to the existing car-maintenance problems may very well be an insurmountable task, which Inland obviously took into account when it chose to use the tapered wooden block as a substitute for hand brakes in its switching operation. The record fully justifies Inland's decision.

There is still another reason why the Secretary's case must fail and that is the failure to prove economic feasibility. Other matters which both the Secretary and the Union have argued in their briefs have not been overlooked, but are without substance or merit and require no comment.

HOUSEKEEPING

The citation charges Inland with having "excessive amounts of scrap metal and wood debris between tracks" in "B" and "F" yards thereby creating a tripping hazard

[21] The unrebutted testimony of James Martin reflects that Inland's heavy industrial usage of equipment would necessitate substantially more repairs of hand brakes than that experienced by railway carriers (Tr. 3132, 3148).

in violation of the housekeeping standard, 29 C.F.R. §1910.22(a)(1). The Secretary acknowledges that the nature of Inland's business "would result in some debris in [its] railyards" (Secretary's Brief, p. 30). We may be reminded that the nature and extent of an employer's duty imposed by the Act, whether it be under the general duty clause or specific, promulgated standards, is qualified by the Act's essential purpose: "to assure *so far as possible* . . . safe and healthful working conditions . . . ." 29 U.S.C. §651(b). (Emphasis added.) It should also be recognized that where, as here, the hazardous condition is a recurrent one, the employer's duty is an active and continuous one and carries with it the necessity of making such inspection of the premises from time to time as circumstances warrant in order to discover and remedy the hazard.

The Secretary pins his case on the testimony of compliance officer Gigli and photographic evidence. Mr. Gigli testified that during his inspection he found what he felt was an "excessive" amount of debris on the passageways between two tracks, including wood pallets and beams and metal rails. The photographs do not portray what reasonably could be described as an excessive or inordinate accumulation of debris. In fact, the photographs of "B" yard taken by Mr. Gigli on May 1, 1979, show such a negligible amount as to be almost unworthy of notice (Photo Exhs. 79-20-6, 79-20-13, 79-20-14). At one point Mr. Gigli testified that he did not know how long the debris was present either before or after his inspection (Tr. 1153); however, at another point in his testimony, he acknowledged that the debris he saw in

"B" yard on May 1, 1979, was not present when he returned the following day (Tr. 1039-1040, Photo Exhs. 79-20-6, 79-20-16).

What should be emphasized is that the record contains no significant evidence demonstrating employees were exposed to a tripping hazard. Although Mr. Gigli provides us with a vague generality concerning switching operations (Tr. 920), there is no testimony upon which one may base a valid finding of employee exposure. The pertinent photographs show freight cars standing idly on tracks with no employee in sight.[22] Whether the debris seen by Mr. Gigli was present an hour before or after his inspection cannot be determined from the evidence presented, and no reasonable inference could be drawn that debris existed for such a length of time and under such circumstances that an employee would have been exposed to a tripping hazard, or that Inland should have discovered it in time to have removed it.

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[22] The photographic evidence comports with the following testimony given by Mr. Gigli on direct examination (Tr. 754-755):

> Q. In other words, how did you go about identifying the cars that are set forth in the citations?
>
> A. Identifying the cars I was going to inspect?
>
> Q. Yes, right.
>
> A. I simply asked to check, spot check different yards located on the premises. I did not check all the yards.
>
> *I would randomly select a track that was not being used where there were cars parked on the tracks* and walked down the tracks and inspect the cars on that track. (Emphasis added.)

Appendix D—Opinion, Secretary of Labor v. Inland Steel Company.

FINDINGS OF FACT

1. Inland's intraplant railway operation comprises 150 to 175 miles of railway track and 3,000 railroad freight cars of which 1,400 are open-top gondolas used to carry scrap metal; the gondola cars are subject to substantial wear and tear.

2. Inland's transportation department has safety rules for reporting and repairing defective equipment, stepping between cars, and opening couplers.

3. Inland's employees are adequately trained in and have adequate knowledge of the transportation department's safety rules.

4. Because of the heavy usage to which they are put, damage to the gondola cars is a recurrent problem which Inland endeavors to resolve by assigning special work crews for detecting and repairing the damaged cars, in addition thereto, switching crews are required to report all defective equipment.

5. Inland has an adequate safety program covering the hazards in question, and it enforces its safety rules, however, some employees, acting on their own initiative, take unnecessary risks by ignoring safety rules in pursuance of hastening the movement of cars for the sole purpose of achieving longer lunch periods, earlier quitting time and preferential job assignments.

6. The Secretary has failed to demonstrate a feasible method of preventing and repressing the hazardous conduct of Inland's transportation department employees.

7. Inland uses wooden blocks instead of hand brakes as a safeguard against the recognized hazard of inadvertent movement of plant railway cars.

8. Inland does not need hand brakes to slow or stop moving cars because the speed is adequately controlled by locomotives and the dish-shaped topography of the yards.

9. The evidence fails to establish that, as a means of holding standing railway cars during either intraplant railway transport or switching operations, wooden blocks are unacceptable in either the steel industry or the claimed "relevant" industry of interstate common carriers by railroad.

10. Debris is a recurrent problem in Inland's plant railyard, but the evidence fails to establish that Inland does not keep its railyards reasonably free of debris in accordance with the housekeeping standard, 29 C.F.R. §1910.22(a)(1).

CONCLUSIONS OF LAW

1. The charge of violating the general duty clause of section 5(a)(1) of the Act, 29 U.S.C. §654(a)(1), is not warranted.

2. The charge of repeated violation of section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), by failing to comply with the housekeeping standard, 29 C.F.R. §1910.22(a)(1), is not warranted.

Appendix D—Opinion, Secretary of Labor v. Inland Steel Company.

ORDER

It is ordered that citations number 1 and 2, issued on June 14, 1979, are vacated, and the penalties proposed therefor nullified.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: April 7, 1982
Boston, Massachusetts

APPENDIX E

Excerpts from Hearing Transcript

[1] UNITED STATES OF AMERICA
Occupational Safety & Health Review Commission

SECRETARY OF LABOR,

Complainant,

vs.

WHEELING-PITTSBURGH STEEL CORPORATION,

Respondent.

OSHRC Docket Nos. 76-4807, 76-4808.

Date: March 16, 1977, Wednesday
Location: Pittsburgh, Pennsylvania
Before: The Honorable Henry K. Osterman

Appearances:

On behalf of the Complainant: Gregory B. Taylor, Esquire, U.S. Department of Labor, 881 Federal Office Building, 1240 E. 9th Street, Cleveland, Ohio 44199.

On behalf of the Respondent: Francis P. Massco, Esquire, Wheeling-Pittsburgh Steel Corporation, Monessen, Pennsylvania 15062.

[2] *CERTIFICATE*

This is to certify that the attached proceedings before the Occupational Safety & Health Review Commission in the matter of:

SECRETARY OF LABOR,

Complainant,

vs.

WHEELING-PITTSBURGH STEEL CORPORATION,

Respondent.

OSHRC Docket Nos. 76-4807, 76-4808.

Date: March 16, 1977, Wednesday
Location: Pittsburgh, Pennsylvania
Before: The Honorable Henry K. Osterman
were held as herein appears, and that this is the original transcript for the files of the Commission.

HAYES/SCHMITT REPORTING, INC.
MARBIN I. SCHMITT
Marbin I. Schmitt
Court Reporter

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[6] of the employees of the Respondent. Therefore, I would make a motion that the complaint be dismissed.

The Court: I deny it. I think the complaint refers to 5(a)(1) of the Act which implies that the employer shall provide a work place free of recognized hazards. I think that is adequate.

Mr. Massco: Thank you.

The Court: Go ahead, Mr. Taylor, unless you have something else to say.

Mr. Taylor: We have no opening statement. We would like to go ahead with our opening witness, Mr. Maglicic.

KENNETH M. MAGLICIC, called as a witness by the Complainant, having been duly cautioned and sworn, was examined and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Please state your name. A. My name is Kenneth M. Maglicic. That is M-a-g-l-i-c-i-c.

Q. What is your home address, Mr. Maglicic? A. It is 2626 Shrewsbury Road. That's S-h-r-e-w-s-b-u-r-y, Columbus, Ohio.

Q. What is your occupation? A. I am a Compliance Safety and Health Officer.

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[8] how many inspections have you made of such facilities? A. Approximately ten.

Q. Did you have occasion to make an inspection of the facilities to the Wheeling-Pittsburgh Steel Corporation of the Steubenville and Mingo Junction during October 4th to 8th, 1976? A. Yes.

Q. During that inspection, who accompanied you? A. During that inspection, I was accompanied by an Employer Representatives, Mr. McCready, Mr. McCurdy, Mr. Kelly, Mr. Mooney; and during the Employee Representatives, I was accompanied by Mr. Santaro and Mr. DalBenzio.

Q. What was the general subject matter of that inspection? A. It involved two subjects, one being the operation, handling, and use of brakes of bottles in hot metal transfer cars and the use of two-way radios in regards to trailers.

Q. Would you explain on the basis of your inspection and the basis of any previous experience in what manner are so-called hot metal transfer cars used in this particular facility? A. At this particular facility and from my experience in the steel industry, hot metal transfer cars or bottles are used to transfer molten metal from the blast furnaces to either a BOF shop, A Basic Oxygen Furnace shop, or an open [9] hearth, or in this case at a particular situation, some of the hot metal transfer cars were used to transfer to the foundry a captive foundry we had at Pittsburgh and the Steubenville plant.

Q. Now the term "bottle", is that an equivalent term to the term "hot metal transfer car"? A. Yes. The term "bottle" was used at Steubenville and the Mingo plants to describe hot metal transfer cars. I learned later that the engineering name or the manufacturer's name, the name that they used, the technical name for the equipment is a hot metal transfer car.

Q. Or there is mentioned in these citations two facilities. Would you describe geographically what is the relationship between the so-called Steubenville Works or North Works and the Mingo Junction or the Steubenville South Works? A. The relationship is basically that they are owned by the same employer, Wheeling-Pittsburgh Steel Corporation, and they are adjacent to the town area, one in Steubenville and one in Mingo Junction. They are connected by a single railroad track between the two plants, but they are separate physical locations. And

from talking to the representatives on the inspection, that there was a distance of approximately four or five miles between the two plants; and this distance was connected by a railroad track.

[10] Q. Are these bottles containing molten metal actually transported from one works to the other? A. Yes.

Q. From what to what are they transported? A. Well, the bottles are transported from the blast furnace at Steubenville to the BOF shop at Mingo, and they are also transferred from the blast furnace at Mingo to the BOF shop at Mingo across the yard. At Steubenville, some of the hot metal transfer cars are taken from the blast furnace to their foundry at that plant.

Q. How are these transfers or transportation effected? Is this some kind of a train we are talking about? A. Basically, yes. It encompasses approximately sometime one hot metal transfer car or sometimes four or five depending on the necessity, and it is these transfer cars are hooked on to by a locomotive and taken to a specific destination.

Q. Is there a train crew of some sort assigned for this work? A. Yes, there is.

Q. What does that consist of? A. It consists of an engineer, a brakeman and a conductor.

Q. How does the hot metal or molten metal get into one of these bottles? A. Well, it gets into one of these bottles by being placed underneath a lower level to the blast furnace to

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[41] Q. A little bit being what? A. Well, enough to crush the wood, and then the wood would stop the car.

Q. It would stop the car? A. Yes.

Q. Did you observe any employee become injured while he was placing or removing the chocks from the cars while you were there? A. No.

Q. Do you know of your own knowledge whether in the past ten years any employee of Wheeling-Pittsburgh Steel Corporation at the Mingo Junction Plant or the North Plant was injured while placing or removing the chocks from those cars? A. No.

Q. You don't know or the answer is no? A. As to my knowledge and investigation and information that was taken in talking to the employees, that there was no injuries there that was related to my inspection.

Q. Then I ask you, Mr. Maglicic, why do you call it a hazard to place chocks under the wheels? A. Because in my background and knowledge of safety principles and practices and the various sources that were contacted, it seemed inconceivable to me that you would not have a set or permanent braking means on a railroad car of any sort. From my background and what I obvserved at U.S. Steel

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[44] determine whether or not the employee should set the brake or not? A. Yes.

Q. You were talking about one photograph, and you said that in this instance it might be more hazardous for an employee to set the brake. Do you recall that? A. Yes, in one instance, I recall that.

Q. As a matter of fact in that instance, isn't it safer to use the wooden chocks? A. If the brake—depending on the conditions as you stated before—it would depend on various conditions in the area whether it would be more safe or unsafe to use the brake or not provided only one

brake was in use. You would have to take into account a lot of different factors, how many cars are being attached to the locomotive, whether there is hot metal in the car, the space that we are dealing with, are there blocks in there right now at this time; and it is strictly a judgement factor. But if these brakes were operable on both ends of the hot metal transfer car, the one that would allievate any pinch points, whether it was more free of movement, it would be a more accurate brake to set.

Q. In answer to the employee's complaint, I take it that is why you made the inspection? You said there were two complaints, one about the radios and one about the brakes on the molten cars?

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[56] DIRECT EXAMINATION

By Mr. Taylor:

Q. Would you state your name, please? A. Albert R. Chappano.

Q. How do you spell that? A. C-h-a-p-p-a-n-o.

Q. Where do you live, Mr. Chappano? A. I live at 921 Logan Street, Mingo Junction, Ohio.

Q. Where do you work? A. Wheeling-Pittsburgh Steel.

Q. How long have you been with Wheeling-Pittsburgh Steel? A. I was hired May 1, 1963.

Q. What is your present position there? A. I am conductor on the hot metal run, South Works.

Q. How long have you done that kind of work? A. I have been off and on as conductor on the hot metal and braking area—out of the 13 or 14 years I've been there, I'd say three or four years probably, maybe longer.

Q. What does your job as conductor involve? A. It's taking care of the metal itself and the furnaces. When

the metal comes in the North furnaces, they put it in a water works pocket. I take the metal off the furnace at the South Works after they get that cast. From the North, I take it to the BOF. I take it to the mixer to be bumped or [57] store or take it to the BOF and put it where they can use it.

Q. In terms of the way you do your work, what do you physically do as a conductor? A. I do the same thing as a brakeman, only thing I am in charge. I handle the brakes on a car; I tie brakes on. I bring the metal from one place from the furnaces to the BOF. I also take the metal from the furnace to the mixer where we store metal. Then when they start back up, I go back to the mixer and take it to the BOF.

Q. Do you ride on the engine? A. I ride on the engine in the cars.

Q. Do you get on the ground as part of your work? A. Yes, sir.

Q. What do you do on the ground? A. I do my walking on the ground. I walk ahead sometimes and line up. When we are switching down at the BOF, I stay on the one and align switches when the engine comes back to me.

Q. You say you do the chocking of these wheels? A. Yes, sir.

Q. You also set brakes on cars? A. If there are brakes available, which there aren't.

Q. How many bottles are there? A. I think there is 19. We had a few from Monessen that went back. They sent them back.

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[101] Mr. Massco: Mr. McCready.

Appendix E—Excerpts from Hearing Transcript.

THOMAS McCREADY, called as a witness by the Respondent, having been duly cautioned and sworn, was examined and testified as follows:

Direct Examination:

By Mr. Massco:

Q. State your name, please? A. Thomas McCready.

Q. Spell you last name, Mr. McCready. A. M-c-C-r-e-a-d-y.

Q. What is your home address, Mr. McCready? A. It is 533 Braybarton, B-r-a-y-b-a-r-t-o-n, Steubenville, Ohio.

Q. How old are you, Mr. McCready? A. Fifty-six.

Q. By whom are you employed? A. Wheeling-Pittsburgh Steel.

Q. In what capacity? A. General Superintendent of Transportation.

Q. At what location? A. The Steubenville Plant.

Q. How long have you been employed in that capacity? A. Since February of two years ago.

Q. Prior to that, were you employed by Wheeling-Pittsburgh Steel Corporation? [102] A. Yes, since 1965.

Q. And in what capacity? A. First, as Superintendent of Transportation at the Monessen Plant and then the General Superintendent of Transportation, Monessen Plant.

Q. As General Superintendent of Transportation at the Steubenville Plant, what are your duties briefly? A. I have responsibility for track maintenance, car maintenance, locomotive maintenance, crane maintenance, deck crane and river crane operation, and also the railroad transportation operation in both plants.

Q. Prior to coming to work for Wheeling-Pittsburgh Steel Corporation, were you associated with or employed

by the transportation industry? A. Yes, since December 1939.

Q. Would that have been the railroad industry? A. I was employed from December 1939 until May of 1960 by the Pittsburgh and West Virginia Railroad; they have since merged with the N & W Railroad. Then I worked for two years as an ICC Locomotive Inspector with the Federal government, and then back to the P & WV as General Superintendent until the time of the merger in 1963. At the time of the merger, I worked with the N & W and P & WV. In 1965, I went with then Pittsburgh Steel of Monessen.

Q. Mr. McCready, I'll ask you to talk a little slower so [103] that the reporter can catch everything you are saying.

Are you familiar with the operations, particularly with regard to transportation operations, at the blast furnaces and the BOF at the Steubenville Plant of Wheeling-Pittsburgh Steel Corporation? A. Yes, sir.

Q. Do you know what a hot metal car is? A. Yes, sir.

Q. Is that commonly called a bottle? A. Bottle or torpedo.

Q. Are you familiar with the citations that were issued in this case, Mr. McCready? A. Yes, sir.

Q. Mr. Massco: Your Honor, I have marked this particular exhibit R-1.

The Court: That is correct.

Q. Mr. McCready, I show you what I have marked as Exhibit R-1 and ask you to describe what that is. A. This is a general line drawing of a Treadwell hot metal carrier.

Q. Before we get into that particular drawing, I just want to ask you how many hot metal cars you have in operation now? A. Presently we have 22.

Q. Twenty-two? [104] A. Yes.

Q. Are they all generally the same or similar to or very similar to what is shown on that drawing? A. Yes, sir.

Q. Mr. Maglicic has already described what a hot metal car is. Were you here when he gave the description, Mr. McCready? A. Yes, sir.

Q. Would you say the description was accurate or would you add anthing to it? A. I think it was sufficient.

Q. Now when hot metal cars are manufactured by the company that makes them—and in that instance I guess it was Treadwell—do they manufacture them with hand brakes? A. Yes, sir.

Q. At the plant in Steubenville, it is alleged that some of the hot metal cars, and not all 22 of them, have defective brakes. Would you agree with that? A. Yes, sir.

Q. Would you agree that the brakes aren't used at Steubenville by Wheeling-Pittsburgh employees? A. Yes, sir.

Q. If the cars are manufactured with brakes, why aren't they used? A. It is a matter of convenience and necessity. It is [105] not necessary to set the hand brakes when the wheels are properly chocked, and the bottles are stopped.

Q. Why would the manufacturer equip them with hand brakes if it is not necessary to use them? A. The manufacturer has to have these cars transported within the country. They travel in interstate commerce on a railroad. A car in interstate commerce must be equipped with a hand brake to be offered in interchange.

Q. It is your opinion that is why they are equipped with hand brakes? A. Yes, sir.

Q. Once they arrive at a plant, do they ever leave the plant? A. No, sir. I'll have to modify that. None of ours have ever left the plant, no.

Appendix E—Excerpts from Hearing Transcript.

Q. As long as they are used in the plant, would you say it was safer to use chocks? A. Yes, sir.

Q. Would you explain to Judge Osterman what you mean by that? A. Well, when we talk about spotting a torpedo or a hot metal ladle at the blast furnace, there are usually three of them. Let's talk about number 5 furnace. There are usually three bottles shoved in there at one time. They shove in there and stop under the spouts, and the slack is adjusted [106] in the three cars. The slack is the movement between the couplers on either of the three cars on the locomotive. The brakeman then places a chock behind the wheel, and the wheel—any slight movement of the wheel, it's a soft wood block, crushes the block out, anchors the block between the wheel and the rail, and secures the bottles. He can make his cut, and then pull away from the bottles.

In coupling into these bottles, he has to couple into where the pit will drop and lock the knuckles together. When this is accomplished, then he can take tension against the drawhead; and the brakeman can kick the block out from under the wheel and they can go ahead with their move. I don't think, contrary to some of the statements that have been made here, that one hand brake on one end of that torpedo would secure it. On a normal railroad car, there are truck under each end of the car, consisting of two pair of wheels. Under these torpedos, there are double trucks under each end of the car. There is no physical connection between the two trucks except the bottle or the torpedo. There is no mechanical leverage running from a brake on one truck to the brake on another truck, as there is on a conventional railroad car.

So when you set a hand brake on one end, you are in effect setting the hand brake under only that end of the car. So to secure this car—and this car mentioned here has been wrong. Roughly the weight of this bottle empty is in excess [107] of 100 tons. We say the empty weight is 100 tons; the hot metal weight is 200 ton. We have a total of 300 gross tons we could be talking about here. We need a coefficient of friction between the brake shoe and the wheel, on all wheels; and friction between the rail and the wheel to secure that much weight and be able to stop it. It was mentioned here that the torpedo is moving and being able to stop with the hand brake; it would be necessary how fast the torpedo was moving before the hand brake could be efficient. At speeds tying that hand brake on and tying it on securely, it would take a great distance to stop that car. You're talking about 300 tons. These are mechanical brakes; we're not talking about air brakes.

I have my opinion that if we were to rely on hand brakes, hand brakes would have to be secured on both ends of the car. This would be more dangerous than relying on the chocks.

We have just recently passed a million man-hours on the Transportation Department without a lost-time accident, and this includes handling the torpedo cars.

> The Court: Are you saying then that one piece of white pine, which is soft, three-quarters of an inch thick and three inches wide and twelve inches long will hold 300 gross ton better than a hand brake?
>
> [108] The Witness: Yes, sir. Our blocks are cut out of four by four. They are in the area of eight

inches long, cut on a diagonal, so there is nothing at one end and four inches square at the other end. Soft wood is better than hard wood because the same correlation could be made between a steel wedge and a lead wedge. If the wheel and the rail form a triangle and you put a hard wood block under it, they could squeeze that block and cause it to squeeze right out; whereas if it is a soft block, it will chew into it and ride up on it and block it under the wheel.

The Court: We are discussing now a piece of soft white pine three-quarters of an inch thick?

The Witness: Yes, I would say in my experience—I've had experience where cars were parked on a hill and chocked as well as hand braked, and hand brakes have been knocked off; and the chock was attempted to be knocked out from under the wheel. The only part of the chock that was left between the wheel and the rail was the part that was crushed under there, and those cars stayed anchored there on that hill.

By Mr. Massco:

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[112] under 5(a)(1) the government is required to show the hazard is generally known to the industry.

Mr. Taylor: I won't quarrel with that.

The Court: I am going to let him answer that question.

By Mr. Massco:

Q. What is the practice with regard to chocking in other steel industries? A. In other industries they use the chock and do not rely on the hand brake.

Q. Mr. McCready, if in fact you required the transportation employees to set the hand brake, are you saying that you would require them to set both hand brakes? A. Yes, sir.

Q. If they did this and there was a spill while one of these bottles was being loaded, how would they loosen the hand brakes on both ends? A. It would be impossible.

Q. Would it be hazardous for them to do it? A. Definitely.

Q. Is it less hazardous just to knock the chock out? A. Yes.

Q. As a matter of fact, have you ever seen one of these chocks burned out by a spill? A. Yes, sir.

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[115] same must be blocked by chuck blocks".

When cars are left on a grade—the track at the blast furnace area and the track at the BOF are for all purposes level. It's flat land; it's next to the river; it's river grade. It's not considered a grade. It's considered level track. The chocks are used to hold those cars on spot. Now if it was in an ore yard where the track is on a grade where the hand brakes must be applied to every car to retain them there. This is on the level track, and the momentum that is generated when the hot metal is poured into the hot metal is what we are driving against.

Q. So you disagree with the statement that has been made today that there is a slope or an incline at any of these places where these bottles are? A. Yes. The only slope or incline that would occur would be low joints in the track.

Q. As far as you are concerned, that is not a grade? A. No, sir.

Q. So the rule is not applicable? A. Right.

Q. I would like to have you examine what has been marked as C-21 and C-22 relating to the chocking of wheels. Are the chocks being used on the wheels on those pictures similar to this exhibit, this wooden exhibit that was previously identified?

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[124] The Court: Thank you, Mr. Boni.
Mr. Massco: Mr. Charles Kirby.

CHARLES KIRBY, called as a witness by the Respondent, having been duly cautioned and sworn, was examined and testified as follows:

Direct Examination

By Mr. Massco:

Q. Would you state your name, please? A. Charles Kirby.

Q. How old are you, Mr. Kirby? A. Thirty-nine.

Q. Where do you live? A. At 616 North Front Street, Wheeling, West Virginia.

Q. By whom are you employed? A. Wheeling-Pittsburgh Steel.

Q. In what capacity? A. General Yardmaster.

Q. What are the duties of a General Yardmaster? A. Well, I am in charge of all rail operations in the South Plant.

Q. That's commonly known at the Mingo Junction Plant? A. Yes, sir.

Q. How long have you been employed in that capacity? A. Two years as General Foreman.

Q. Prior to that time? [125] A. Seven years as Turn Foreman.

Q. The yardmaster? A. Yes.

Q. During the course of a typical working day, are you in the vicinity of the hot metal cars? A. Yes, sir.

Q. You see them being spotted by the blast furnace? A. Yes, sir.

Q. Do you see them being removed from the blast furnace area? A. Yes, sir.

Q. Do you see them being transported to the mixer? A. Yes, sir.

Q. Do you see them being transported to the BOF area? A. Yes, sir.

Q. How long have you been working at Mingo Junction, Mr. Kirby? A. Seven years.

Q. In the seven years that you have been there, have the employees being using chocks to spot the hot metal cars? A. Yes, sir.

Q. Do they use the hand brakes? A. No, sir.

Q. I believe Mr. Chappano testified earlier. Were you here when he testified?

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[130] or slag car is stopped completely, where the metal or slug isn't moving back and forth, it is level.

Mr. Massco: You May cross-exanmine.

CROSS EXAMINATION

By Mr. Taylor:

Q. Mr. Kirby, you testified as to your knowledge, you didn't know of these bottles rolling free. Are you specifically contradicting Mr. Chappano's earlier testimony, or are you merely stating that you don't know of it? A. Nothing that was reported to me. And anything of this nature is usually reported to me. Any

complaints from the crew is reported to me from my Turn Foreman on Turns.

Q. Would you necessarily have been in the vicinity when these incidents occurred? A. No, sir. But if you had a complaint or anyone had a complaint, it would have been turned in to me.

Q. I believe you also testified that in your opinion it was less hazardous on these bottles to use chocks and brakes. Do you mean to say unqualifiedly that is always the case? A. What do you mean unqualifiedly

Q. Under all circumstances when these bottles were started, it was less hazardous to use chocks than it is to use brakes? A. On the furnaces, yes, definitely.

Q. Looking at Exhibits C-14 and C-32 which are pictures [131] previously identified, are you suggesting in those particular instances that the way those bottles are located, the outside of those bottles, it would be less hazardous to apply the brakes from the outside position than to place chocks? A. I said the inside position. This man here in the middle photo, which is C-14, this switchman here would have to crawl, get on the other end of the bottle, crawl all the way over the bottle against the wall to tie that brake. There is this much clearance here. There is no room for a man on the side of the car there.

Q. At the end where is he— A. That's the outside brake.

Q. You are not testifying that it is more hazardous for him to be doing what he is doing there than to chock the wheel at that point; are you? A. The outside brake is available right there. It's the inside brake I'm talking about against the wall where you have to stand up on the platform here. You have to climb up on the platform

(indicating), get clear on the other end against the wall, reach over and tie the brake.

Q. But you don't have to do that on the outside? A. No, sir, it's right there. That is right where you chock it, right here. If you would be up on this bottle tying the brake down, you are out of sight of that engineer. When you chock that bottle, that engineer is looking right [132] down at you.

Q. So it's only in certain locations— A. It's all the furnaces.

Q. I mean certain locations of the bottles or certain ends of the bottles under certain conditions— A. South blast furnace, the outside brakes are available. At the North furnaces they are not available because you have close clearance on both sides at the North furnace, and you can't tie them down.

Q. You made reference to an incline at the number 5 furnace. Could you elaborate at all on that? How long does that incline go? A. You only gave room to spot the bottles on the south spout. At the other end of the bottle, there is about a third of a bottle on the other end of it, which there is nothing spotted there. Is that what you mean?

Q. I just wanted to get as much detail as possible. A. You can spot three bottles on the number 5 furnace, and then you have a section in back of the first bottle, about a third of the bottle, that you don't use.

Q. Because of an incline? A. No, that is the way the spouts are set up.

Q. Where is the incline located at number 5? A. I don't get what you mean.

Q. You testified that it is relatively flat—

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APPENDIX F

Constitutional Provisions, Statutes and Regulations

Fifth Amendment to the United States Constitution, U.S. CONST. amend. IV:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§654, 660 (1970):

§654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations,

and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

Pub.L. 91-596, §5, Dec. 29, 1970, 84 Stat. 1593.

§660. Judicial review

Filing of petition by persons adversely affected or aggrieved; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; appropriate relief; finality of judgment

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order

of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28. Petitions filed under this subsection shall be heard expeditiously.

Filing of petition by Secretary; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; enforcement of orders; contempt proceedings

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) of this section shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 659 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

Appendix F—Constitutional Provisions, Statutes and Regulations.

Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

Pub.L. 91-596, §11, Dec. 29, 1970, 84 Stat. 1602.

Appendix F—Constitutional Provisions, Statutes and Regulations.

Code of Federal Regulations, 29 C.F.R. §2200.73:

§2200.73. Burden of proof.

(a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary.

(b) In proceedings commenced by a petition for modification of the abatement period, the burden of establishing the necessity for such modification shall rest with the petitioner.

Columbus Area Office
360 South Third Street
Room 109
Columbus, Ohio 43215

NATURE OF VIOLATION	CITATION NO.
SERIOUS	1

REGION	AREA	PAGE
1800 5		1 OF 1

INSPECTION DATE:
10/4 - 10/8/76
INSPECTION SITE:
Same As Company Address

TO: Wheeling Pittsburgh Steel Corp.
North Works South Third St.
Steubenville, Ohio 43952

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

PENALTIES ARE DUE WITHIN 15 DAYS OF RECEIPT OF THIS NOTIFICATIO UNLESS CONTESTED (See enclosed Booklet)

This Section M Be Detached Before Posting

This citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED: DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
The violations described in this citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.		
1 Public Law 91-596 Section 5(a)(1): The employer did not furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.		$1,000.0
a) Brakes on bottles that transport molten metal were not set when they are spotted;	11/15/76	
b) Brakes on bottles that transport molten metal were not maintained to assure correct functioning on bottle 4 machinery end and opposite the machinery end, on bottle 13 machinery end, on bottle 16 machinery end and opposite the machinery end;	12/29/76	

APPENDIX G
Citations
97a

AREA DIRECTOR
Peter M. Schmitt Peter M. Schmitt

$1,000.0

NOTICE TO EMPLOYEES – The law gives an employee or his representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL – The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

TOTAL PENAL FOR THIS CITATION
Make Check or M Order Payable t "DOL OSHA Indicate OSHA # on Remittan

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION – The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

CITATION AND NOTIFICATION OF PENALTY

OSHA 2 (REV 9/7

CITATION and NOTIFICATION of PENALTY

Columbus Area Office
360 South Third Street
Room 109
Columbus, Ohio 43215

ISSUANCE DATE	OSHA NUMBER	
10/29/76	M4463	456
REGION	AREA	PAGE
1800	5	1 OF 1

TYPE OF VIOLATION	NUMBER OF VIOLATIONS
SERIOUS	1

INSPECTION DATE:
10/4-10/8/76
INSPECTION SITE:
South Works Commerical Ave.
Mingo Junction, Ohio

TO: Wheeling Pittsburgh Steel Corp.
South Third Street
Steubenville, Ohio 43952

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

PENALTIES ARE DUE WITHIN 15 DAYS OF RECEIPT OF THIS NOTIFICATION UNLESS CONTESTED (See enclosed Booklet)

This Section May Be Detached Before Posting

This citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
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1 Public Law 91-596 Section 5(a)(1): The employer did not furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.		$1,000.
a) Brakes on bottles that transport molten metal were not set when they are spotted.	11/15/76	
b) Brakes on bottles that transport molten metal were not maintained to assure correct functioning on bottle 2 machinery end, and opposite the machinery end, on bottle 6 opposite the machinery end, on bottle 7 opposite the machinery end, on bottle 9-A machinery end, on bottle 10 machinery end and opposite the machinery end, on bottle 11 opposite the machinery end, on bottle 12 machinery end and opposite the machinery end, on bottle 14 opposite the machinery end.	12/29/76	

Appendix G—Citations. 99a

AREA DIRECTOR
Peter M. Schmitt Peter M. Schmitt

$1,000.

NOTICE TO EMPLOYEES – The law gives an employee or his representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL – The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

TOTAL PENALTY FOR THIS CITATION
Make check or Money Order Payable to "DOL OSHA" Indicate OSHA No on Remittance

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION – The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

CITATION AND NOTIFICATION OF PENALTY

OSHA 2 REV. 5/76

Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

No. 82-843

In the Supreme Court of the United States

OCTOBER TERM, 1982

WHEELING-PITTSBURGH STEEL CORPORATION, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Washington, D.C. 20530
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Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Secretary of Labor proved that abatement of petitioner's violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), was feasible and of likely utility.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-843

WHEELING-PITTSBURGH STEEL CORPORATION, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported. The decision of the Occupational Safety and Health Review Commission (Pet. App. 10a-25a) and the decision of the administrative law judge (Pet. App. 3a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982. A petition for rehearing was denied on August 24, 1982 (Pet. App. 27a). The petition for a writ of certiorari was filed on November 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a steel manufacturer with two facilities located approximately five miles apart in Steubenville and Mingo Junction, Ohio (Pet. App. 4a, 13a). Petitioner uses locomotive-powered hot metal transfer cars, referred to as

"bottles," to transport molten iron within and between the two facilities (*id.* at 4a, 14a). When a bottle, which weighs approximately 300 tons when full, is stopped, or "spotted," a groundman places a single "chock," a piece of wood three-quarters of an inch thick, three inches wide and twelve to eighteen inches long, beneath one wheel of the bottle in order to brake the entire car (*id.* at 4a-5a, 15a). Each bottle car is equipped with two hand brakes, but petitioner has neither encouraged their use nor maintained them in good repair (*id.* at 15a). At times relevant to this case, brakes on 19 of petitioner's 22 bottles were inoperable (*ibid.*).

Employees are exposed to potential injury from two sources because hand brakes are not set during spotting. First, employees may be injured in the process of setting the chocks by movement from unbraked bottles (Pet. App. 21a). Second, chocks are easily crushed by the weight of the bottles and the bottles may move enough to splash molten iron or may even roll free, striking employees or splashing them (*id.* at 16a, 17a). On several occasions, bottles have rolled unattended as far as 300-400 yards (*id.* at 4a-5a, 17a-18a, 21a). In one instance, an employee had to run beside two coupled bottles that had eluded the chocks, stopping the bottles by setting one of the hand brakes. One witness to this incident indicated that the bottles would have collided with a bumping block had the brake proved inoperable (*id.* at 17a). In addition, the bottle track traverses a work area and employees standing along the route of a runaway bottle risk being splashed by molten iron (*ibid.*).

2. As a result of an employee complaint, a compliance officer of the Occupational Safety and Health Administration (OSHA) inspected petitioner's facilities from October 4 to 8, 1976 (Pet. App. 14a). Following this inspection, the Secretary of Labor issued two citations charging that petitioner had violated the "general duty clause" of the

Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1),[1] in that brakes on bottles were not set when the bottles were spotted and were not maintained to assure correct functioning (Pet. App. 4a, 18a).

3. Petitioner contested the citations. After a hearing, the administrative law judge found that chocks "are easily crushed by the immense weight" of bottles and that "in order to place chocks under the wheels of these cars an employee must lean over and, at times, expose a part of his hand or body to injury if the car should move" (Pet. App. 4a, 5a). The administrative law judge vacated the citations, however, maintaining that the alleged hazard, which he identified as the use of chocks in lieu of hand brakes, was not recognized in the industry or by the general public (*id.* at 6a-7a). Although noting "contradictory evidence on the issue," the administrative law judge concluded that the Secretary failed to prove "that the use of wooden chocks placed under the wheels of said cars in lieu of using hand brakes on the cars is a hazardous procedure" (*id.* at 8a).

4. The Secretary obtained review of the administrative law judge's ruling with the Occupational Safety and Health Review Commission (Commission). The Commission affirmed in part and reversed in part (Pet. App. 10a-25a). After comprehensively reviewing the facts in light of the requisite elements of a general duty clause violation, the

---

[1]The general duty clause, 29 U.S.C. 654(a)(1), requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." To establish a violation, the Secretary of Labor must prove that the employer (1) failed to render his workplace free of a hazard that (2) was recognized, (3) was causing or likely to cause death or serious harm, and (4) was amenable to useful and feasible abatement measures. *National Realty & Construction Co.* v. *OSHRC*, 489 F.2d 1257, 1265-1267 (D.C. Cir. 1973).

Commission concluded that petitioner failed to render its work place free from a recognized hazard likely to cause death or serious physical harm. Specifically, the Commission held that the administrative law judge had incorrectly identified the hazard as the use of chocks rather than as "the crushing or burning of employees by the uncontrolled movements of bottle cars carrying molten metal" (*id.* at 20a-21a). The Commission also noted that this hazard was recognized, both by petitioner and the steel industry in general, because "Wheeling-Pittsburgh as well as other steel companies * * * took some measures such as chocks or hand brakes, or both, to protect against this hazard" (*id.* at 22a). The Commission also held that it was reasonably foreseeable that a chocked bottle would move and that the likely consequence would be death or serious physical harm to petitioner's employees (*id.* at 21a-22a). Finally, the Commission concluded that maintaining operable hand brakes on bottles was a useful and feasible means of abating the hazard, noting petitioner's prior use of hand brakes as well as other steel employers' use of them (*id.* at 23a-24a).

The court of appeals denied a petition for review of the Commission's decision, stating that "[t]he Commission's findings of fact are supported by substantial evidence and it applied the correct legal standards" (Pet. App. 2a).

ARGUMENT

The decision of the court of appeals, summarily affirming the Commission, does not conflict with the decisions of this Court or of any other court of appeals. The Commission's determination that the proposed means of abatement of the recognized hazard were feasible and useful reflects the appropriate legal standard. Accordingly, further review by this Court is unwarranted.

Petitioner principally contends (Pet. 8-15) that the court of appeals erred in affirming the Commission's decision because the Commission failed to apply an objective test in determining that the Secretary had proved the existence of a useful and feasible means of abating the hazard. Petitioner argues that this determination requires the Commission to consider whether a reasonable person familiar with conditions in the industry would have instituted more elaborate precautions (Pet. 8, 10). However, the central premise of petitioner's contention, *i.e.*, that such an objective test is applicable to all elements of a general duty clause violation, is manifestly incorrect.

Petitioner confuses the methods of proof relevant to establishing a useful and feasible means of abatement under the general duty clause with those methods of proof relevant to establishing a violation of the personal protective equipment standard set forth in 29 C.F.R. 1910.132(a) and 1926.28(a). Under the latter standard, personal protective equipment must be provided "wherever it is *necessary* by reason of hazards." 29 C.F.R. 1910.132(a) (emphasis added). To give employers constitutionally adequate notice of proscribed conduct by clarifying the term "necessary," the courts of appeals have imposed an objective requirement that "a reasonable man familiar with the conditions of the industry would have instituted the [proposed] protective measure." *Pratt & Whitney Aircraft* v. *Secretary of Labor*, 649 F.2d 96, 106 (2d Cir. 1981); *General Dynamics Corp.* v. *OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979).[2]

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[2]The three cases upon which petitioner places its principal reliance use an objective test to clarify otherwise vague language in the personal protective equipment standard and the general duty clause. In *Voegele Co.* v. *OSHRC*, 625 F.2d 1075 (3d Cir. 1980), and *American Airlines, Inc.* v. *Secretary of Labor*, 578 F.2d 38 (2d Cir. 1978), the courts determined whether use of personal protective equipment was "necessary" by considering whether a reasonable safety expert familiar with

In contrast, establishing a method of abating a recognized hazard under the general duty clause requires proof of the likely utility and feasibility of the proposed measures. See, *e.g.*, *Continental Oil Co.* v. *OSHRC*, 630 F.2d 446, 449 (6th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *Babcock & Wilcox Co.* v. *OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980); *National Realty & Construction Co.* v. *OSHRC*, 489 F.2d 1257, 1266-1267 (D.C. Cir. 1973). "Feasibility" is a clear and concrete term, which does not need an objective test to give employers notice of its meaning. In this case, the Commission, upheld by the court of appeals, properly found petitioner's prior use of hand brakes, coupled with evidence that other steel employers use hand brakes, determinative of feasibility (Pet. App. 23a n.4). In addition to such evidence of feasibility, the courts of appeals may also consider "whether a precaution is recognized by safety experts as feasible." *National Realty & Construction Co.* v. *OSHRC, supra*, 489 F.2d at 1266 n.37. See also *General Dynamics Corp.* v. *OSHRC, supra*, 599 F.2d at 464; *Continental Oil Co.* v. *OSHRC, supra*, 630 F.2d at 449. Although application of an objective test may yield evidence of feasibility, such a test clearly is not required.[3]

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the industry would have instituted more elaborate precautions. Similarly, in *Magma Copper Co.* v. *Marshall*, 608 F.2d 373 (9th Cir. 1979), the court used an objective test to determine whether a hazard was "recognized" under the general duty clause. In this case, petitioner does not challenge the Commission's conclusion (Pet. App. 22a) that the Secretary established the existence of a recognized hazard likely to cause death or serious injury (see Pet. 10).

[3]Petitioner also argues (Pet. 10-11) that the Commission erred by deciding that the workplace was not "free" of the hazard without considering whether a reasonable person would have instituted more elaborate precautions. This argument is without merit. The statutory duty that an employer must maintain its workplace "free" from recognized hazards is expressed in absolute terms and thus is not subject to a reasonable person test. *National Realty & Construction Co.* v. *OSHRC, supra*, 489 F.2d at 1265. The requirement that the workplace

Equally without merit is petitioner's assertion (Pet. 8, 18) that actual industry practice, which petitioner identifies in this case as the use of chocks rather than brakes, is determinative of feasibility.[4] As the First Circuit explained in *General Dynamics Corp.* v. *OSHRC, supra,* 599 F.2d at 464:

> [W]e cannot agree * * * that the measure of the adequacy of [the employer's] safety program should be that of the industry. Such a standard would allow an entire industry to avoid liability by maintaining inadequate safety training. The purpose of the Act is to require all employers to take all feasible steps to avoid industrial accidents * * *.[W]e cannot accept a standard for the precautions which should be taken against * * * a hazard which is any less than the maximum feasible.

Thus, while industry practice may be relevant in assessing the feasibility of abatement measures, it is not, as petitioner asserts, controlling. See *Donovan* v. *Royal Logging Co.*,

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be absolutely free of recognized hazards does not, however, lead to harsh results. Other provisions in the general duty clause limit the employer's duty to maintain a hazard-free workplace: before an employer is found in violation, the hazards must be "recognized" and must be preventable through a feasible means of abatement. *Id.* at 1265-1267.

[4]The courts have imposed an industry practice test in determining whether a particular hazard is "recognized" under the general duty clause because of the vagueness of that term. In the absence of proof of actual employer knowledge of a hazard, the Secretary must show that the condition is known generally in the industry. See, *e.g., Continental Oil Co.* v. *OSHRC, supra,* 630 F.2d at 448; *National Realty & Construction Co.* v. *OSHRC, supra,* 489 F.2d at 1265 n.32. Here, the Commission found both actual employer and general industry recognition of the hazard of bottles rolling free, demonstrated by the fact that petitioner and others in the steel industry take some measures to protect against the hazard (Pet. App. 22a).

645 F.2d 822, 830 n.6 (9th Cir 1981); *Continental Oil Co.* v. *OSHRC, supra,* 630 F.2d at 449; *National Realty & Construction Co.* v. *OSHRC, supra,* 489 F.2d at 1266 n.37. In this case, the Commission noted that some steel employers do utilize hand brakes and it correctly concluded that the use of brakes was therefore feasible (Pet. App. 19a, 23a n.4).[5]

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[5]Petitioner also maintains (Pet. 15-19) that the court of appeals erred in affirming the Commission's allegedly unexplained rejection of factual findings made by the administrative law judge. It is well established that the Commission, not the administrative law judge, is the ultimate finder of fact. The Commission's factual findings are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. 660(a); *Champlin Petroleum Co.* v. *OSHRC,* 593 F.2d 637, 640 (5th Cir. 1979). The Commission set out in full the evidence supporting its findings. In fact, contrary to petitioner's assertion (Pet. 18), the Commission did not even reject the administrative law judge's factual finding with respect to the usual industry practice. Rather, recognizing that some steel employers do utilize hand brakes (Pet. App. 19a, 23a n.4), the Commission noted that a finding of industry-wide practice was not necessary in order to establish a violation (*id.* at 20a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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KAREN I. WARD
Associate Solicitor

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Department of Labor

JANUARY 1983

DOJ-1983-01